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### Repository Citation

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## Power Shifts in International Law: Structural Realignment and Substantive Pluralism

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William W. Burke-White\*

*For most of the past sixty years, the United States and Europe have led, independently and collectively, the international legal system. Yet, the rise of Brazil, Russia, India, and China (the BRICs) over the past decade has caused a profound transformation of global politics. This paper examines the implications of this redistribution of power for international law. While international lawyers have long debated the ability of law to constrain state behavior, this paper shifts the debate from the power of law to the role of power within international law. It first advances a structural argument that the diffusion, disaggregation, and issue-specific asymmetries in the distribution of power are giving rise to a multi-hub structure for international law, distinct from past structures such as bipolarity and multipolarity. This multi-hub structure increases pluralism within the international legal system. It also creates downward pressure on international legal processes to migrate from the global level toward a number of flexible, issue-specific subsystems. The paper then proceeds to demonstrate that the anticipated pluralism is emerging at three substantive tension points as some rising powers articulate distinct preferences with respect to sovereignty, legitimacy, and the role of the state in economic development. At each of these tension points, rising powers are reasserting the preeminence of the state in international law, leading to a gradual turning away from the individualization of international law championed by the United States and Europe back toward the Westphalian origins of the international legal system. Notwithstanding this turn, the United States stands to benefit from the new multi-hub structure of international law.*

On September 25, 2009, in an overcrowded conference room at the David L. Lawrence Convention Center in Pittsburgh, the leaders of the Group of 20 ("G20") declared the informal group of states to be the "premier forum for . . . international economic cooperation," effectively replacing the more intimate, transatlantic-led G7/8.<sup>1</sup> Less than two months later, at 7 p.m. on December 18, 2009, President Obama walked into a room in the Bella Conference Center in Copenhagen, anticipating a bilateral meeting with Chinese Premier Wen Jiabao. Instead he found himself arriving late, or perhaps without invitation, at an ongoing multilateral meeting with Premier Wen, Brazilian President Lula, Indian Prime Minister Singh, and South African

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1. G20 Leaders Statement: The Pittsburgh Summit para. 19 (Sept. 25, 2009), <http://www.g20.u-toronto.ca/2009/2009communiqu0925.html>.

President Zuma.<sup>2</sup> It was only in this setting, away from the remaining 188 states participating in the negotiation, that any deal—even one as thin as the Copenhagen Climate Accord—could be reached.<sup>3</sup>

These two moments are emblematic of the rapid and profound redistribution of power in the international system. China has risen.<sup>4</sup> Brazil, India, and Russia are following.<sup>5</sup> Numerous other states, from Turkey to Mexico, Indonesia to South Africa, are quickly transitioning from secondary or even tertiary status to meaningful global actors.<sup>6</sup> The relative power of the United States is declining. The era in which the United States and Europe together could steer the international legal system has passed. Much has been written about how this power shift will influence international politics. Yet, international lawyers have rarely examined how this changing distribution of power will alter the processes and substance of international law.<sup>7</sup> Where they have done so, they have generally assumed that the decline of American hegemony and the rise of the BRICs (Brazil, Russia, India, and China) will have a uniform and largely detrimental effect on international law.<sup>8</sup> The reality, however, is far more nuanced, and quite possibly more positive.

The reluctance of international lawyers to grapple with this redistribution of power may stem from the uneasy relationship that has long existed between power and international law.<sup>9</sup> Classical international lawyers saw their role as one of scientific inquiry into what the law was, denying any role for power. As Vattel wrote in 1760, “[p]ower or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant is

2. For a transcript of the White House briefing outlining these events, see Joe Romm, *White House Tells Amazing Inside Story of How the Copenhagen Accord Was Reached*, CLIMATEPROGRESS (Dec. 20, 2009), <http://thinkprogress.org/climate/2009/12/20/205232/white-house-tells-amazing-inside-story-of-how-the-copenhagen-accord-was-reached/>.

3. See United Nations Framework Convention on Climate Change, Copenhagen Climate Change Conference, Copenhagen, Den., Dec. 7–19, 2009, *Rep. of the Conference of the Parties on its 15th Session, held in Copenhagen from 7 to 19 December, 2009*, FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

4. See generally NOAH FELDMAN, *COOL WAR: THE FUTURE OF GLOBAL COMPETITION* (2013); AARON FRIEDBERG, *A CONTEST FOR SUPREMACY: CHINA, AMERICA AND THE STRUGGLE FOR MASTERY IN ASIA* (2011).

5. See Harold James, *The Rise of the BRICs and the New Logic in International Politics*, INT’L ECON., Summer 2008, at 41.

6. See generally JIM O’NEILL, *THE GROWTH MAP: ECONOMIC OPPORTUNITY IN THE BRICS AND BEYOND* (2011).

7. On the lack of scholarship in this space, see Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369, 372 (2005). For a review of scholarship on power, see generally Richard H. Steinberg & Jonathan Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64 (2006).

8. See, e.g., Eric Posner & John C. Yoo, *International Law and the Rise of China*, 7 CHI. J. INT’L L. 1, 15 (2006) (“The history of the first Cold War, the current American and Chinese attitudes toward international law, and the current state of international institutions all point to . . . the weakness of these institutions for managing a superpower conflict.”).

9. See Oscar Schachter, *The Role of Power in International Law*, 93 AMER. SOC’Y INT’L L. PROC. 200, 200 (1999) (describing “power as antithetical to law”).

...<sup>10</sup> In the mid-20th century, political realists such as Carr and Morgenthau launched an attack on international law, fundamentally shaping international lawyers' relationships with power ever since.<sup>11</sup> They argued that law was merely an epiphenomenon of power.<sup>12</sup> International law only exists, they claimed, due to "identical or complementary interests of states, backed by power."<sup>13</sup>

If classical international lawyers were right that "[p]ower or weakness does not . . . produce any difference," the present power redistribution should have no impact on international law.<sup>14</sup> In contrast, if Morgenthau were correct that "prospective beneficiaries" of a redistribution of power will "try to bring about a corresponding change of the legal rules, whereas the beneficiaries of the legal *status quo* will resist any change of the old order," the result would be, in his words, "a competitive contest for power" whereby "change in the existing legal order will be decided, not through a legal procedure provided for by this same legal order, but through a conflagration of conflicting social forces which challenge the legal order as a whole."<sup>15</sup>

Yet the reality may be more complex than either of these positions allows. Classical international lawyers ignored the fact that power does influence state behavior and, hence, international law. Morgenthau, like most classical realists, offered an over-determined view of power. His critique assumed that states seek to maximize power as a primary value.<sup>16</sup> In fact, states want far more than power and have a varied set of preferences that shape their behaviors. These preferences matter critically because what states want and how badly they want it determine their willingness to use some portion of their power to achieve an objective.<sup>17</sup> Due to the recognition that they can advance their interests through the existing system of international law, rising powers are not attempting to wholly destroy the edifice of international law nor even rejecting international law *per se*. Rather, they are seeking to

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10. EMMERICH DE VATTTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* § 18 (Charles G. Fenwick Trans., Carnegie Inst. of Wash. 1916) (1758).

11. See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993) ("Much of the theoretical scholarship in both international law and international relations can be understood as either a response to or a refinement of this [realist] challenge.").

12. See, e.g., EDWARD HALLETT CARR, *THE TWENTY YEARS CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (1964); Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940).

13. Morgenthau, *supra* note 12, at 275.

14. VATTTEL, *supra* note 10, at § 18.

15. Morgenthau, *supra* note 12, at 275–76.

16. See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 5 (Alfred A. Knopf ed., 5th ed. 1978). Morgenthau recognized that such capacity could change over time. *Cf. id.*

17. See generally Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

adjust the system from within and to make contemporary international law more compatible with their own preferences.

As many international lawyers have sought to prove Morgenthau right or wrong by examining the ability of international law to have a causal influence on state behavior, they have focused their inquiry on the power of law to constrain state behavior.<sup>18</sup> This paper shifts the debate to a related but distinct question—the role of power *within* law. It opens an inquiry into how changes in the distribution of power influence the processes and substance of international law. This debate is much more rarely engaged but is particularly important in light of today's changing distribution of power.<sup>19</sup> The perennial debate has been about whether law can constrain power. The question here is how power and changes in the distribution of power shape the law. If law is merely a reflection of state power, rather than a constraint on that power, then it should equally be, in substance, what powerful states want it to be.<sup>20</sup>

The United States and Europe,<sup>21</sup> independently and collectively, have had extraordinary influence on both the processes and substance of international law over the past sixty years. During this unique transatlantic moment, while they have not always agreed with one another, they have often been

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18. The constraint of power by international law has been the focus of international law and international relations scholarship. For reviews, see *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) [hereinafter *INTERDISCIPLINARY PERSPECTIVES*]; William W. Burke-White, *International Law and International Relations: Two Generations of Interdisciplinary Scholarship and a Second Term Agenda* (2012) (unpublished working paper) (on file with author); Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47 (2012). For recent examples of literature arguing that law does (or does not) have the ability to influence state behavior independent of power, see JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 3 (2005); John C. Yoo & Robert J. Delahunty, *Peace Through Law? The Failure of a Noble Experiment*, 106 MICH. L. REV. 923 (2008); John C. Yoo & Will Trachman, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379 (2004).

19. A few scholars have addressed this question directly. See Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001). For a response, see Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003). Nico Krisch has undertaken the only recent treatment, though it is largely historical. See generally Krisch, *supra* note 7. The collapse of the Soviet Union spurred a strand of scholarship on the role of hegemony in international law. The 2000 meeting of the American Society of International Law was devoted to the role of the "single superpower." See Johan van der Vyver et al., *The Single Superpower and the Future of International Law*, 94 AM. SOC'Y INT'L L. PROC. 64 (2000). The *Chicago Journal of International Law* devoted its first issue to the topic of American hegemony and international law. See Symposium, *American Hegemony and International Law*, 1 CHI. J. INT'L L. 1 (2000).

20. For an articulation of this view, see Krish, *supra* note 7, at 382 ("Most predominant states have been active forces behind the development of international law, and they have made extensive use of the international legal order to stabilize and improve their position.").

21. Europe is treated as a unitary actor in this paper because of the growing role played by Europe's Common Foreign and Security Policy after the Lisbon Treaty and due to the fact that, within international law, the positions of European states are often aligned. See generally Kateryna Koehler, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor*, 4 CAUCASIAN REV. INT'L AFF. 57 (2010).

able to collectively lead the creation, interpretation, and enforcement of international legal rules. In so doing, they have embedded their particular preferences into the substance of international law.<sup>22</sup> Present power redistributions have brought an end to that transatlantic moment. The question then is how changes in the distribution of power are influencing and altering both the processes and substance of international law. This paper answers that question with both a structural and a substantive claim. Structurally, it argues that international law is transitioning into a new structure, termed here a multi-hub system. The multi-hub system both fosters pluralism and pushes many of the processes of international law toward a number of separate, but flexible, subsystems. Substantively, the paper argues that rising powers are not rejecting international law as Morgenthau predicted, but are instead articulating distinct preferences within the existing system that challenge aspects of the transatlantic vision of international law, often through a reassertion of the role of the state. These new preferences increase the diversity of ideas in international law, fostering what is here termed substantive pluralism.<sup>23</sup>

From the end of World War II until the fall of the Union of Soviet Socialist Republics ("USSR"), the international political order was bipolar, with the United States and the USSR acting as conflicting, counterbalancing poles.<sup>24</sup> For the past two decades that order has been unipolar, with the United States as the sole global hegemon.<sup>25</sup> Today, a new power structure of international law is emerging with three basic characteristics.<sup>26</sup> First, power is diffuse—a relatively large number of states are amassing significant power. Second, power is disaggregated—different states have relative advantages in different types of power (military power, economic power, and soft power) that have variable effectiveness in different areas of law. Third, power is asymmetrically distributed—many states have or can develop significant

22. See, e.g., John B. Bellinger III, *Reflections on Transatlantic Approaches to International Law*, 17 DUKE J. COMP. & INT'L L. 513 (2007); Daniel Bethlehem, *A Transatlantic View of International Law and Lawyers: Cooperation and Conflict in Hard Times*, 103 AM. SOC'Y INT'L L. PROC. 455 (2009).

23. For an expanded discussion of international legal pluralism, see William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2004). This concept of pluralism, which focuses on the range of norms being contested and articulated in the legal system, is somewhat distinct from traditional legal pluralism. Cf. Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988).

24. See, e.g., Richard Ned Lebow, *The Long Peace, The End of the Cold War, and the Failure of Realism*, 48 INT'L ORG. 249 (1994); John J. Mearsheimer, *Back to the Future: Instability in Europe After the Cold War*, 15 INT'L SEC. 5 (1990); Kenneth Waltz, *The Stability of a Bipolar World*, 93 DAEDALUS 881, 888 (1964).

25. See Robert Jervis, *Unipolarity: A Structural Perspective*, 61 WORLD POL. 188, 190 (2009). Some have argued that Europe represents a second pole in the current political order. See Andrew Moravcsik, *Europe: Rising Superpower in a Bipolar World*, in RISING STATES, RISING INSTITUTIONS: CHALLENGES FOR GLOBAL GOVERNANCE 151 (Alan S. Alexandroff & Andrew F. Cooper eds., 2010).

26. This project focuses on changes in the distribution of power among states. Another simultaneous shift of power from states to private actors, including individuals, corporations, and NGOs, is beyond the scope of this study. See generally Jessica Matthews, *Power Shift*, 76 FOREIGN AFF. 50 (1997); Oscar Schachter, *The Decline of the Nation State and Its Implications for International Law*, 35 COLUM. J. TRANS-NAT'L L. 7 (1998).

power advantages over others in the system on an issue-specific basis. These three characteristics produce a system that is not unipolar, bipolar, or multipolar, but rather *multi-hub*.<sup>27</sup>

The distinction between a multipolar system and the multi-hub structure of international law is not just semantic. In a multipolar system, such as the Concert of Europe, a fixed group of Great Powers or poles engage in rivalry and balancing, dominating a far larger group of weaker, subordinate states.<sup>28</sup> In contrast, in the newly emerging multi-hub structure a growing number of states play issue-specific leadership roles in a more flexible and fluid system. In the right circumstances, many different states can act as hubs, leading international legal processes or articulating preferences that attract followers and alter substantive norms. In other circumstances, those same states may follow the lead of others. Whereas in a classical multipolar system, the status of a pole usually turned on its ability to coerce followers, in the multi-hub structure, with a wide range of states capable of assuming leadership in a flexible system, the ability of a hub to attract followers will often be as or more important than its ability to coerce them. The multi-hub system thereby empowers states that are not hubs in a particular instance with choices as to which of a number of hubs to follow on any given issue or even to build the issue-specific power necessary to assume leadership themselves.

The emergence of this multi-hub system has two significant structural implications for international law. First, it promotes international legal pluralism as hubs assume leadership and advance alternate norms within and among a number of flexible subsystems in a kind of variable geometry. As hubs seek to gain followers, they have opportunity and incentives to articulate distinct preferences for the evolution of the substance of international law that reflect their own interests and may be attractive to potential followers.

Second, this new structure pushes and pulls international legal processes—such as rulemaking, interpretation, and enforcement—from the global level of the system toward these separate, flexible subsystems. Due to both the increasing number of relevant states and the diffusion of power among them, it is becoming increasingly difficult to successfully conclude international legal processes that are truly global in scope. In contrast, due to asymmetric power distributions that facilitate leadership by hubs, legal processes that are confined within particular subsystems are becoming comparatively more successful. The result is a gradual, but discernable, shift in

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27. For the initial use of the term "hub" in this context, see ARNOLD WOLFERS, DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS 210 (1962) ("If one visualizes the alliance system in the form of a wheel, one may say that . . . the United States is located at the hub of the wheel.").

28. For this distinction, see GLENN H. SNYDER & PAUL DIESING, CONFLICT AMONG NATIONS: BARGAINING, DECISION MAKING, AND SYSTEM STRUCTURE IN INTERNATIONAL CRISES 419 (1977). For a discussion of the operation of a traditional multipolar system, see generally HENRY KISSINGER, A WORLD RESTORED: METTERNICH, CASTLEREAGH AND THE PROBLEMS OF PEACE, 1812–22 (1973).

rulemaking, interpretation, and enforcement from the global level toward particular subsystems. Whether any individual international legal process in fact moves toward such subsystems will turn on an issue-specific calculation of the marginal costs and benefits of global processes over their more readily available subsystemic alternatives. The overall vector of change, however, is toward these separate subsystems.

Substantively, this paper argues that the pluralism anticipated in the multi-hub structure is emerging at three critical tension points in the international legal system. At these tension points one or more hubs articulates and advances preferences that conflict with the norms previously embedded in international law, largely by the United States and Europe. While an analysis of power alone can illuminate changes to the structure of the international legal system, understanding current and future substantive change at these tension points requires an analysis of the preferences of rising powers.<sup>29</sup> State preferences determine when and whether states will use some portion of their power to seek particular results through international law.<sup>30</sup>

Examination of those preferences shows that rising powers are not rejecting international law through the kind of “competitive contest for power” Morgenthau predicted.<sup>31</sup> Instead, they are embracing the system, while seeking change *within* it. Consideration of the preferences of China, India, Brazil, and Russia—four states with exceptionally rapid economic growth rates—shows how rising powers are already influencing international legal norms.<sup>32</sup> First, sovereignty: for Russia and China, sovereignty is a more absolute concept than the more permeable vision of sovereignty that had been advanced during the transatlantic moment. Second, legitimacy: Brazil and India evaluate legitimacy based on participation and process, in contrast with a U.S. approach that prioritizes effectiveness. Third, the role of the state in economic development: Brazil, India, and China all have a far more state-centric approach to economic development than the liberal development agenda advanced by the United States and Europe and embedded in many rules of international economic law.

As these states articulate unique preferences in international law they become hubs of the system. To the degree other states follow, pluralism increases and substantive tensions develop. Contestation is occurring within international law as states selectively accept and reject rules made by new hubs, joining or exiting their respective subsystems on particular issues. Given downward structural pressures toward pluralism and subsystem-level

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29. See generally Moravcsik, *supra* note 17.

30. This approach builds particularly on the ideas of International Legal Process scholarship that recognized the complex interplay between substance and processes. See, e.g., ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE* xiii-xv (1968).

31. See Morgenthau, *supra* note 12, at 275.

32. The depth of the consideration of preferences here is constrained by space. Ultimately, a book-length treatment is necessary.



processes, distinct preferences and different rules may be advanced and develop within separate subsystems. Some of these preferences may, at times, lead to change in the global rules constructed during the past half century. At other times, they may result in fragmentation based on the contestation of preferences and even normative visions among hubs and across various subsystems.

The preferences being advanced by rising powers at these three tension points all relate to different visions of the role of the state in the international legal system. The United States and Europe have promoted a fundamentally Lockean conception of international law that emphasizes the role and rights of individuals, often at the expense of the power of the state.<sup>33</sup> Many rising powers' preferences for sovereignty, legitimacy, and economic development, in contrast, reassert the role and significance of the state. While it is premature to predict the ultimate resolution of these tensions, the substance of international law may be shifting back toward its Westphalian origins, with states reassuming the more central role in international law that they enjoyed in the past.

While the emergence of this multi-hub structure may have troubling implications for some legal regimes—human rights, for example—on the whole the impact of present power shifts is likely to be more positive than is often assumed. Even from the perspective of Washington, these developments may be beneficial. The decline of hegemony may mean that Washington's particular preferences may not prevail on every specific issue. But, perhaps surprisingly, the United States stands to benefit from emerging pluralism. The United States has long sought flexibility within the international legal system. By embracing pluralism among the multiple, competing preferences of different subsystems, the United States will be able to maintain the freedom it enjoyed as hegemon, even as its hegemony declines. The United States remains comparatively well-placed to build coalitions of different subsystems that advance its interests. Building such coalitions in the multi-hub structure will be far easier for the United States than it was to generate the kind of global consensus often necessary during the period of U.S. hegemony. The multi-hub structure, in short, can serve U.S. interests.

It is important to note the limited goals of this project. The purpose here is neither to make absolute claims about changes to international legal process nor specific predictions about future legal rules. Rather, the goal is to consider the role of power within international law, to identify the structural characteristics of a multi-hub legal system, and to consider the substantive tension points at which international law is likely to adapt. This framework

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33. See, e.g., Louis Henkin, *Human Rights and State "Sovereignty,"* 25 Ga. J. Int'l & Comp. L. 31, 40 (1995). See also Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2034 (2003) ("[T]he international community has become a party to the social contract between citizens and their government.").

should facilitate future issue-specific analysis of the likely evolution of both the process and substance of a wide range of specific legal regimes.

This article proceeds as follows. Part I provides a brief account of the role of power within international law, based on the causes of state behavior and the nature of power. Part II argues that the diffusion, disaggregation, and asymmetric distributions of power are giving rise to a multi-hub system that is distinct from traditional unipolar and multipolar orders. Part III makes a structural claim that the multi-hub system is fostering pluralism among the preferences of hubs in the system and moving many legal processes into flexible subsystems built by and around these hubs. Part IV makes a substantive claim that select rising powers are articulating different preferences about sovereignty, legitimacy, and economic development that generate tensions in the international legal system and, collectively, reassert the role of the state. Finally, the conclusion ties together these structural and substantive developments, speculating on the direction of future evolution, and suggesting the potential benefits of the multi-hub system for the United States.

## I. POWER, PREFERENCES, AND INTERNATIONAL LAW

The claim that power matters within international law is not new. Before proceeding to an examination of present changes to the distribution of power and their implications for international law, it is necessary to set out the relationship between power and preferences that underlies this study. This Part does so by first providing a brief theoretical account of state behavior and then examining the nature of power today.

### A. *The Theoretical Model*

The critique of international law leveled by the mid-century political realists was based on theoretical assumptions about the causes of state behavior, according to which states simply seek to maximize their power against a background condition of anarchy. In that model, law was an epiphenomenon of power.<sup>34</sup> In contrast, other theoretical approaches, such as institutionalism, recognize more space for international law to influence state behavior through the provision of information or cooperation around common interests.<sup>35</sup> This article, however, moves beyond traditional debates about the ability of power to constrain law.

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34. See Morgenthau, *supra* note 12, at 269 (arguing that international law “needs . . . to be seen within the sociological context of economic interests, social tensions, and aspirations for power, which are the motivating forces in the international field . . .”).

35. See generally ROBERT KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977); ROBERT O. KEOHANE, *AFTER HEGEMONY* (1984); STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

This section provides a theoretical model to explain the relationship between preferences and power that explains how the preferences of newly powerful states influence and alter international legal norms. To do so, it draws on a range of existing political science theories—including realism, institutionalism, and liberalism—that emphasize different assumptions about the behavior of states in the international system. The overall approach taken here is largely based on liberal political science theory.<sup>36</sup> Liberal theory's "fundamental premise" is that preferences matter. What states want determines—within externally imposed material constraints—what they do.<sup>37</sup> Recognizing the role of preferences and the distinct preferences of rising powers facilitates analysis of how they will use their new power to advance their interests within the international legal system.

Liberal theories of political science are based on three fundamental assumptions. First, the actors in the international system are states, individuals, and international organizations, all of which promote their own, differentiated interests. Second, states represent some subset of domestic society, "on the basis of whose interests . . . [governments] define state preferences."<sup>38</sup> Finally, "the configuration of interdependent state preferences determines state behavior."<sup>39</sup> In short, liberal theory assumes that "what states want is the primary determinant of what they do."<sup>40</sup> Liberal theory's emphasis on preferences critically differentiates this approach from that of the classical realists.

While preferences matter greatly in this analytic framework, the underlying origin of those preferences is not essential to this argument. Whether state preferences flow from the interests of domestic actors, alternative normative visions, or even changes in the power distribution itself is an interesting question, but one that need not be resolved here.<sup>41</sup> It is the articulation of these preferences in international law, not their origins, that is important to this analysis.

Liberal theory may seem an unusual starting point for an examination of the impact of the redistribution of power on the international legal system. After all, "liberals causally privilege variation in the configuration of state preferences, while treating configurations of capabilities and information as

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36. See MICHAEL DOYLE, *THE WAYS OF WAR AND PEACE* (1997); Andrew Moravcsik, *Liberal Theories of International Law*, in *INTERDISCIPLINARY PERSPECTIVES* 83, *supra* note 18; Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000).

37. Moravcsik, *supra* note 17, at 516 ("[T]he relationship between states and the surrounding domestic and transnational society in which they are embedded critically shapes state behavior by influencing the social purposes underlying state preferences . . .").

38. *Id.* at 518.

39. *Id.* at 520.

40. *Id.* at 521.

41. See generally ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999) (on norms as the source of state behavior); Alastair Iain Johnston, *Is China a Status Quo Power?*, 27 INT'L SEC. 5 (2003) (on Chinese preference change with growing power); Moravcsik, *supra* note 17 (on domestic interests as the source of preferences).

if they were . . . fixed constraints.”<sup>42</sup> Yet, liberal theory recognizes that power distributions and system-structure may constrain, facilitate, or otherwise shape the actions states take in pursuit of their preferences.<sup>43</sup> Specifically, relative power sets a ceiling on the resources states can deploy to advance their preferences in any given circumstance.<sup>44</sup>

An analysis of the consequences of present power shifts for international law cannot be monocausal, looking only to power or preferences. Liberal theory allows such a multicausal approach. Ultimately, “[i]f foreign policymaking is a process of constrained choice by purposive states . . . a combination of preferences and constraints shapes state behavior.”<sup>45</sup> This article takes such a multicausal approach, beginning with examination of shifts in the distribution of capabilities in Part II and the implications of those shifts for the structure of international law in Part III.<sup>46</sup> It then turns, in Part IV, to the preferences states are advancing in international law within the constraints imposed by the new power distribution.<sup>47</sup> Fundamentally, it is the “policy interdependence” among these preferences as constrained by the distribution of power that will determine the evolution of international law.<sup>48</sup>

### B. Power Within International Law

Within this multicausal framework, the starting point for this inquiry is ongoing shifts in the distribution of power in the international system. Examining the impact of those changes requires clarifying what is meant by power and how power is converted into international legal influence. Whereas the understanding of power in most realist scholarship is narrow and focused on coercive ability,<sup>49</sup> power is better understood more broadly as

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42. Moravcsik, *supra* note 17, at 520.

43. *See id.* at 542.

44. *See* MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 152 (1947).

45. Moravcsik, *supra* note 17, at 542 (emphasis omitted).

46. To a large degree, those shifts in the distribution of capabilities are analyzed through theories that prioritize the role of power and institutions. For power-based analysis, see ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* (1981); STEPHEN M. WALT, *THE ORIGIN OF ALLIANCES* (1987); JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979); KENNETH N. WALTZ, *REALISM AND INTERNATIONAL POLITICS* (2008). For an institutionalist approach, see KEOHANE & NYE, *supra* note 35.

47. Properly liberal theory would reverse the ordering of analysis because it assumes that preferences are analytically prior to capabilities. The liberal approach assumes that “[s]tates first define preferences . . . then they debate, bargain, or fight to particular agreements—a second stage explained by realist and institutionalist (as well as liberal) theories of strategic interaction.” Moravcsik, *supra* note 17, at 544. To simplify analysis, the approach taken here examines material constraints before turning to preferences. It is, therefore, more consistent with Keohane’s view that “liberalism makes sense as an explanatory theory within the constraints pointed out by . . . realism.” Robert O. Keohane, *International Liberalism Reconsidered*, in *THE ECONOMIC LIMITS TO MODERN POLITICS* 192 (John Dunn ed., 1992).

48. *See* Moravcsik, *supra* note 17, at 520 (defining “policy interdependence”).

49. *See generally* WALTZ, *supra* note 46.

the “capacity to do things and in social situations to affect others to get the outcomes we want.”<sup>50</sup>

This definition recognizes that power is differentiated, and comes in many forms including—to use Joseph Nye’s typology—military, economic, and soft power.<sup>51</sup> Military power, essentially the force that a state’s military can exert, was traditionally prioritized in realist approaches.<sup>52</sup> Economic power<sup>53</sup> flows from imperfect symmetries in the interdependence of states’ economies through, for example, trade, the use of a reserve currency, the deployment of economic sanctions, foreign investment flows, or the delivery of foreign aid.<sup>54</sup> Soft power, often the “pull” of cultural affinity, language commonality, and positive reputation, gives states “the ability to affect others through the co-optive means of framing the agenda, persuading, and eliciting positive attraction in order to obtain preferred outcomes.”<sup>55</sup> These three forms of power are simultaneously independent and interdependent.<sup>56</sup> Issue linkages may facilitate the cross-application of different forms of power to otherwise distinct legal regimes.<sup>57</sup> Yet, each form of power has independent relevance to the overall redistribution of power.<sup>58</sup>

In order to apply power, states must convert raw capability—whether military, economic, or soft—into influence. As Nye explains, while material resources are important, “[p]ower conversion—getting from resources to behavioral outcomes—is a crucial intervening variable” between power itself and the ability to achieve particular outcomes.<sup>59</sup> Distinct forms of power

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50. JOSEPH S. NYE, JR., *THE FUTURE OF POWER* 6 (2012). See also KENNETH E. BOULDING, *THREE FACES OF POWER* (1989).

51. NYE, *supra* note 50, at 25, 51, 81.

52. See generally ROBERT ART & KENNETH WALTZ, *THE USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS* (1983); STEPHEN BIDDLE, *MILITARY POWER: EXPLAINING VICTORY AND DEFEAT IN MODERN BATTLE* 191 (2006).

53. NYE, *supra* note 50, at 55 (“[M]ost cases of economic interdependence also involve a potential power relationship.”). See also CHARLES P. KINDELBERGER, *POWER AND MONEY: THE ECONOMICS OF INTERNATIONAL POLITICS AND THE POLITICS OF INTERNATIONAL ECONOMICS* 56 (1970).

54. See R. Harrison Wagner, *Economic Interdependence, Bargaining Power, and Political Influence*, 42 INT’L ORG. 461 (1988) (on the power that arises from economic interdependence). See generally NYE, *supra* note 50, at 51–80.

55. See generally JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004). For a critique, see LESLIE H. GELB, *POWER RULES: HOW COMMON SENSE CAN RESCUE AMERICAN FOREIGN POLICY* 69 (2010).

56. See Robert Zoellick, *The Currency of Power*, FOREIGN POLICY (Oct. 8, 2012), [http://www.foreignpolicy.com/articles/2012/10/08/the\\_currency\\_of\\_power](http://www.foreignpolicy.com/articles/2012/10/08/the_currency_of_power) (noting that military and economic power are interdependent, but that the United States is only skilled in the deployment of military power).

57. See, e.g., Ernst B. Haas, *Why Collaborate: Issue Linkages and International Regimes*, 32 WORLD POL. 357 (1980). For specific application within the WTO context, see Jose E. Alvarez, *The WTO as Linkage Machine*, 96 AM. J. INT’L L. 146 (2002).

58. The broad definition of power here is particularly appropriate for international law. In other areas, such as global military conflict, narrow definitions may be more appropriate. Definitional distinctions separate this study from those that suggest the emergence of a bipolar system based on converging military capability. See, e.g., FELDMAN, *supra* note 4.

59. NYE, *supra* note 50, at 8. See also Kenneth Dowding, *Power, Capability, and Ableness: The Fallacy of the Vehicle Fallacy*, 7 CONTEMP. POL. THEORY 238 (2008).

convert into international legal influence with different degrees of effectiveness. While “power and the striving for power are crucial variables in the formation and application of international law,”<sup>60</sup> the unique attributes of the international legal system constrain the conversion of some types of power into legal influence.

Power can be converted into influence by “commanding change,” “controlling agendas,” and “establishing preferences.”<sup>61</sup> There is considerable issue-specific variation in the effectiveness with which military, economic, and soft power serve these functions within international law. While military power remains relevant in international law,<sup>62</sup> the general prohibition on the use of force under the U.N. Charter<sup>63</sup> and the inherent constraints on the application of military force to many questions of international law limit its effectiveness.<sup>64</sup> Military power may have direct bearing in limited circumstances, such as enforcement of Chapter VII Security Council Resolutions, or where states may decide to violate Article 2(4) of the U.N. Charter. It may have more indirect bearing within legal regimes relating to humanitarian law or arms control, for example. Outside of these issues, however, constraints on the use of military force and the obsolescence of major war means that today military power converts poorly into more general legal influence.<sup>65</sup>

In contrast with military power, economic power has growing applicability within international law. Across the wide range of subfields of international economic law, including trade, investment, and monetary law, economic power may directly correlate with international legal influence. Unlike military power, the use of economic power—ranging from vote buying to foreign assistance, from trade preferences to economic sanctions—is generally consistent with the norms of the international legal system and far less costly to the imposing state.<sup>66</sup> As Secretary of State Clinton concluded in 2011, today “power is more often measured and exercised in economic

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60. Schachter, *supra* note 9, at 205.

61. NYE, *supra* note 50, at 11.

62. See Schachter, *supra* note 9, at 201 (“[P]ower used coercively . . . is capable of imposing . . . hardship and deprivation . . .”).

63. U.N. Charter art. 2.

64. On the limitations of military power, see Suzanne Nossel, *Smart Power: Reclaiming Liberal Internationalism*, 83 FOREIGN AFF. 131 (2004).

65. On constraints, see Joseph Nye, *Limits of American Power*, 117 POL. SCI. Q. 545, 549 (2002) (“Today the foundations of power have been moving away from the emphasis on military force . . .”). See generally JOHN MUELLER, *RETREAT FROM DOOMSDAY: THE OBSOLESCENCE OF MAJOR WAR* (1989). While there are historical examples in which military power has been cross-applied to repayment of sovereign debt, reprisals are more limited today. See JAMES CABLE, *GUNBOAT DIPLOMACY, 1919–1991: POLITICAL APPLICATIONS OF LIMITED NAVAL FORCE* (1994); Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), art. 50 (prohibiting the use of force as a countermeasure).

66. See NYE, *supra* note 50, at 51–62 (on economic power). For an example of economic power applied, see Natalie J. Lockwood, *International Vote Buying*, 54 HARV. INT’L. L.J. 97 (2013).

terms.”<sup>67</sup> The application of economic power remains issue- and context-specific, based on the particular relationships among the states in question. Outcomes “will often depend on the context of each market and its asymmetries of vulnerability.”<sup>68</sup>

Soft power may be most readily convertible into legal influence, despite definitional and measurement challenges.<sup>69</sup> The “pull” of soft power, such as the desire to cooperate with like-minded states, the affinity for particular cultures, or the shared sense of benevolent goals, operates legitimately within the international legal system and applies across a wide range of issues. The causal pathways through which soft power operates—the “ability to attract . . . [which] often leads to acquiescence”—are highly salient to international legal processes such as treaty negotiation, rule interpretation, and even compliance.<sup>70</sup> Like other forms of power, the application of soft power is issue specific. On certain issues, soft power may have outcome-determinative pull, yet in others, where vital economic relations are at stake or military force under consideration, soft power may have lower salience.

This differential effectiveness with which different types of power convert to legal influence is significant to the impact of present power shifts on the future of international law. It suggests that the changing structure of international law is based on relative shifts in all three forms of power, which have not been equally affected. It further suggests the need for issue-specific examination of power relations among states based on the relative effectiveness of different types of power within specific international legal regimes.<sup>71</sup> Finally, variation in the convertibility of these types of power is fundamental to the fluid, flexible nature of the multi-hub system. Where a state has a comparative power advantage with respect to the most relevant and convertible form of power for a particular legal issue, it may be able to lead a specific international legal process, even if it does not have an absolute power advantage.

## II. POWER SHIFTS AND THE EMERGENCE OF A MULTI-HUB SYSTEM

The “unipolar moment” of the past two decades<sup>72</sup> is quickly giving way to a new power structure in the international political system, the exact

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67. Hillary Clinton, U.S. Sec’y of State, Remarks at the Economic Club of New York: Economic Statecraft (Oct. 14, 2011), *available at* <http://www.state.gov/secretary/20092013clinton/rm/2011/10/175552.htm>.

68. NYE, *supra* note 50, at 80.

69. See Schachter, *supra* note 9, at 201 (“[p]ower also enters into international law . . . through non-coercive measures—the use of benefits and rewards . . . that . . . bear on state interests and affect conduct that can be pertinent to legal rules and processes.”).

70. Nye, *supra* note 50, at 6.

71. For a discussion of the issue-specific nature of regimes, see Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSPECTIVES ON POL. 13 (2009).

72. Charles Krauthammer, *The Unipolar Moment*, 70 FOREIGN AFF. 23 (1990–91). For an introduction to unipolarity, see Jervis, *supra* note 25, at 191. For the debate over the durability of this order, see

contours of which remain much debated. Some suggest that the rise of China is leading to a bipolar order, marked by great power rivalry.<sup>73</sup> Others contend that a multipolar system is emerging with rising powers such as India and Brazil joining the United States and China in great power status.<sup>74</sup> Still a third approach suggests that an orderless world is in the making, without global leadership.<sup>75</sup> Finally, there are those who suggest the United States will continue to lead the international system, albeit with some accommodation of rising powers.<sup>76</sup> While the argument of this paper focuses on the structure of power within international law, it is framed by the more general changes in the distribution of power in the political and economic order.

Despite the differences among these projections, there is relative consensus on the general trends of change in the global political order.<sup>77</sup> Given the extensive literature on fundamental economic drivers of power transitions, just a brief summary is provided here.<sup>78</sup> The story of power shifts starts with China. During the first decade of the 21st century, China experienced extraordinary economic growth. Its Gross Domestic Product ("GDP") expanded from \$1.453 trillion in 2002 to \$10.355 trillion in 2014.<sup>79</sup> The

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Christopher Layne, *The Unipolar Illusion Revisited: the Coming End of the United States' Unipolar Moment*, 31 INT'L SEC. 7 (2006); William Wohlforth, *The Stability of a Unipolar World*, 24 INT'L SEC. 5, 8 (1999).

73. See, e.g., FELDMAN, *supra* note 4; C. Fred Bergsten, Letter to the Editor, *Two's Company*, 88 FOREIGN AFF. 169 (Sept./Oct. 2009).

74. See, e.g., Layne, *supra* note 72, at 5, 7 (arguing that "the 'unipolar moment' . . . will give way to multipolarity"); Kenneth Waltz, *Structural Realism after the Cold War*, 25 INT'L SEC. 5, 34 (2000) (noting that "sooner or later, usually sooner, the international status of countries has risen in step with their material resources"). For a view suggesting China has not yet developed the profile of a major global power, see generally DAVID SHAMBAUGH, *CHINA GOES GLOBAL: THE PARTIAL POWER* (2013).

75. See CHARLES A. KUPCHAN, *NO ONE'S WORLD: THE WEST, THE RISING WEST, AND THE COMING GLOBAL TURN* 5 (2012) (contending the "next world will have no center of gravity"); Ian Bremmer & Nouriel Roubini, *A G-Zero World: The New Economic World Will Produce Conflict, Not Cooperation*, 90 FOREIGN AFF. 2 (Mar./Apr. 2011); Richard N. Haass, *The Age of Non-Polarity: What Will Follow US Dominance*, 87 FOREIGN AFF. 44 (May/June 2008).

76. See G. JOHN IKENBERRY, *LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORLD ORDER* (2011); G. John Ikenberry, *The Rise of China and the Future of the West, Can the Liberal System Survive?*, 87 FOREIGN AFF. 23 (2008); Josef Joffe, *The Default Power: The False Prophecy of America's Decline*, 88 FOREIGN AFF. 21 (Jan.–Feb. 2009).

77. The differences among these predictions are based on different interpretations of the changes in economic growth over the past decade, projections about how different states' growth patterns will evolve in the years ahead, and assumptions about the ability of the existing international order to accommodate rising powers.

78. For analysis of these trends, see KISHORE MAHBUBANI, *THE GREAT CONVERGENCE: ASIA, THE WEST AND THE LOGIC OF ONE WORLD* (2013); NATIONAL INTELLIGENCE COUNCIL, *GLOBAL GOVERNANCE 2025: AT A CRITICAL JUNCTURE* (2010), available at [http://www.iss.europa.eu/uploads/media/Global\\_Governance\\_2025.pdf](http://www.iss.europa.eu/uploads/media/Global_Governance_2025.pdf); NAT'L INTELLIGENCE COUNCIL, *GLOBAL TRENDS 2025: A TRANSFORMED WORLD* (2008) available at [http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/2025\\_Global\\_Trends\\_Final\\_Report.pdf](http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/2025_Global_Trends_Final_Report.pdf); NAT'L INTELLIGENCE COUNCIL, *GLOBAL TRENDS 2030: ALTERNATIVE WORLDS* (2012), available at [http://www.dni.gov/files/documents/Global-Trends\\_2030.pdf](http://www.dni.gov/files/documents/Global-Trends_2030.pdf); RUCHIR SHARMA, *BREAKOUT NATIONS: IN PURSUIT OF THE NEXT ECONOMIC MIRACLES* (2012); MICHAEL SPENCE, *THE NEXT CONVERGENCE: THE FUTURE OF ECONOMIC GROWTH IN A MULTISPEED WORLD* (2011); O'NEILL, *supra* note 6, at 3.

79. Int'l Monetary Fund, *World Economic Outlook Database*, Oct. 2014, <http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx>.



other BRIC countries have also grown rapidly, at times in excess of 10% per year. From 2002 to 2014, Brazil's GDP increased from \$506 billion to \$2.244 trillion,<sup>80</sup> India's from \$522.7 billion to \$2.047 trillion,<sup>81</sup> and Russia's from \$345.1 billion to \$2.057 trillion.<sup>82</sup> One could use any number of superlatives to describe these shifts. Jim O'Neill, who originally coined the "BRIC" term for Goldman Sachs,<sup>83</sup> puts it starkly:

The aggregate GDP of the BRIC countries has close to quadrupled since 2001 . . . . The world economy has doubled in size . . . and a third of that growth has come from the BRICs. Their combined GDP increase was more than twice that of the United States and it was equivalent to the creation of another new Japan plus one Germany, or five United Kingdoms, in the space of a single decade.<sup>84</sup>

While the summer of 2013 was a bad one for the BRICs<sup>85</sup> and growth will likely slow to the 7% range,<sup>86</sup> the expansion of the BRIC economies to date is already sufficient to have structural consequences.<sup>87</sup>

In contrast with the BRICs, the United States and Europe grew far more slowly between 2002 and 2012, with rates generally in the range of 2–3%.<sup>88</sup> During this period, U.S. GDP increased from \$10.6 trillion to \$15.6 trillion.<sup>89</sup> Despite variation at the country level, the economy of the European Union ("EU") as a whole grew to \$16.64 trillion.<sup>90</sup> While this growth is impressive for mature economies, the much more rapid growth of Brazil, Russia, India, and China has allowed them to close, in part, the economic gap with the United States and Europe. In 2002, the U.S. economy was more than seven times the size of China's. By 2012, it was just under twice that of China's.<sup>91</sup> Based on rapid economic growth in the BRICs and relatively slower growth in the United States and EU, a variety of forecasts show China overtaking the United States as the world's largest economy in the next decade.<sup>92</sup>

80. *Id.*

81. *Id.*

82. *Id.*

83. See O'NEILL, *supra* note 6, at 3.

84. *Id.* at 4–5.

85. *Emerging Economies: The Great Deceleration*, THE ECONOMIST, Jul. 27, 2013, available at <http://www.economist.com/news/leaders/21582256-emerging-market-slowdown-not-beginning-bust-it-turning-point>.

86. See Ruchir Sharma, *Broken BRICs: Why the Rest Stopped Rising*, 91 FOREIGN AFF. 2 (Nov./Dec. 2012) (noting structural constraints likely limit BRIC growth).

87. See Daniel W. Drezner, *The New New World Order*, 86 FOREIGN AFF. 34, 34 (Mar./Apr. 2007) ("[BRIC] growth is opening the way for a multipolar era in world politics.").

88. Int'l Monetary Fund, *supra* note 79.

89. *Id.*

90. *Id.*

91. *Id.*

92. Projections of when China will overtake the United States range from 2016–2041. In 2003, Goldman Sachs predicted that the Chinese economy would surpass that of the United States in 2041. See

While debates about the implications of these changes for the international political order will continue, three unique characteristics of the distribution of power are emerging with important consequences for the structure of international law. First, power is becoming more diffuse. Second, power is disaggregating, in that different states are experiencing relative gains in different forms of power. Finally, power is becoming asymmetrically distributed on an issue-specific basis. As applied to international law, these three characteristics give rise to a multi-hub structure, in which a relatively large number of states can lead international legal processes as hubs of the system.

### A. Power Diffusion

A first significant feature of the emerging order is that power is diffusing. Power is not merely shifting from the United States to China or the BRICs; it is diffusing across the system to a large number of states.<sup>93</sup> Rather than being concentrated in the hands of one state (a traditional unipolar system) or a small group of states (a traditional multipolar system),<sup>94</sup> in the emerging structure a relatively large number of states have sufficient power to influence global affairs and an even larger number have regional influence.

A first element of this power diffusion is the rise of the BRIC economies. Comparison of the changing size of global economies illustrates this diffusion of economic power to the BRICs. In 2002, China had the world's sixth largest economy, behind the United States, Japan, Germany, France, and the United Kingdom ("UK") and France.<sup>95</sup> By 2013, it had the second largest, surpassing all but the United States. During the same period, Brazil advanced from 13th largest to 7th, surpassing Canada and Italy, and essentially tied with France and the UK.<sup>96</sup> India moved from 12th to 10th<sup>97</sup> and Russia advanced from 16th to 9th.<sup>98</sup> Table 1 shows these moves and corresponding change in the share of global economic power.

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Dominic Wilson & Roopa Purushothaman, *Dreaming with BRICs: The Path to 2050*, Goldman Sachs Global Economics Paper No. 99 (Oct. 1, 2003), <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/brics-dream.pdf>. That date has been consistently revised forward. According to a 2013 OECD projection, parity may occur as early as 2016. See Simon Rabinovich, *China Forecast to Overtake US by 2016*, FIN. TIMES, Mar. 22, 2013, available at <http://www.ft.com/intl/cms/s/0/0a3f5794-92b3-11e2-9593-00144feabdc0.html#axzz3DzGlfpxM>.

93. Cf. Edward Mansfield, *Concentration, Polarity, and the Distribution of Power*, 37 INT'L STUD. Q. 105, 106 (1993) (arguing that "unlike polarity, [concentration] . . . incorporates both the power inequalities among the major powers and the number of (polar and non-polar) major powers").

94. See generally KISSINGER, *supra* note 28, at 7.

95. Int'l Monetary Fund, *supra* note 79, at 16.

96. IMF growth predictions suggest that by 2017 Brazil may have the 8th largest economy. *Id.*

97. Projections show that by 2017 India's economy may reach \$2.675 trillion (7th place). *Id.*

98. The IMF's 2017 estimates suggest that Russia will continue to grow at rates sufficient to maintain this position. Int'l Monetary Fund, *supra* note 79.

TABLE 1: POWER SHIFTS AND DIFFUSION: 2002–2013

Rank	Country	2002		2013		
		GDP (tn USD)	Per cent of Global GDP*	Country (net change)	GDP (tn USD)	Per cent of Global GDP* (change)
1	U.S.	10.978	32.3	U.S. (—)	16.768	22.5 (-9.8)
2	Japan	3.981	11.7	<b>China (+4)</b>	9.469	<b>12.7 (+8.4)</b>
3	Germany	2.014	5.9	Japan (-1)	4.899	6.6 (-5.1)
4	France	2.014	4.8	Germany (-1)	3.636	4.9 (-1.0)
5	U.K.	1.624	4.8	France (-1)	2.807	3.8 (-2.1)
6	China	1.456	4.3	U.K. (-1)	2.523	3.4 (-1.4)
7	Italy	1.229	3.6	<b>Brazil (+6)</b>	2.246	<b>3.0 (+1.5)</b>
8	Canada	.752	2.2	Italy (-1)	2.072	2.8 (-0.8)
9	Mexico	.742	2.2	<b>Russia (+7)</b>	2.097	<b>2.8 (+1.8)</b>
10	Spain	.688	2.0	<b>India (+2)</b>	1.877	<b>2.5 (+1.0)</b>
11	S. Korea	.609	1.8	Canada (-3)	1.827	2.4 (+0.2)
12	India	.524	1.5	Australia (+3)	1.506	2.0 (+0.7)
13	Brazil	.506	1.5	Spain (-3)	1.359	1.8 (-0.2)
14	Netherlands	.466	1.4	Mexico (-5)	1.261	1.7 (-0.5)
15	Australia	.423	1.3	S. Korea (-4)	1.305	1.7 (-0.1)
16	Russia	.345	1.0	Indonesia (+4)	.870	1.2 (+0.6)
17	Taiwan	.301	.89	Turkey (+2)	.820	1.1 (+4.0)

Although some have framed the rise of China and the other BRICs as a zero-sum process, in which the United States and Europe are the losers,<sup>99</sup> the United States and Europe have, in fact, retained significant economic power.<sup>100</sup> Moreover, International Monetary Fund (“IMF”) projections suggest steadily increasing growth rates in the developed economies over the coming years, though never breaking 3.5%.<sup>101</sup> Europe as a whole remains the world’s largest common market economy<sup>102</sup> with more than 700 million people and a GDP of \$16.64 trillion, larger than the United States and more than double the size of China.<sup>103</sup> In short, Europe remains at the table.<sup>104</sup>

99. The National Intelligence Council suggests that by 2025 Europe could be “a hobbled giant . . . less able to translate its economic clout into global influence.” NATIONAL INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD 32 (C. Thomas Fingar, ed.) (2008). *See also* Naazneen Barma, Ely Ratner & Steven Weber, *A World Without the West*, 90 NAT’L. INT. 23, 23–24 (2007).

100. For analysis of U.S. primacy as well as domestic challenges to economic growth, see, for example, RICHARD N. HAASS, FOREIGN POLICY BEGINS AT HOME: THE CASE FOR PUTTING AMERICA’S HOUSE IN ORDER 21–30 (2013).

101. Int’l Monetary Fund, *supra* note 79.

102. *See* Moravcsik, *supra* note 25, at 160–62.

103. Int’l Monetary Fund, *supra* note 79.

104. Moravcsik, *supra* note 25, at 152.

A key element of the diffusion of power in the emerging system is that wealth creation reaches far beyond the BRICs through what Fareed Zakaria terms “the rise of the rest.” He shows that “countries all over the world [and well beyond the BRICs] have been experiencing rates of economic growth that were once unthinkable.”<sup>105</sup> Using a model based on similar demographic and productivity trends that led to the original BRIC grouping, O’Neill has singled out another group of eleven states (the “N-11”) that is poised for the next wave of rapid economic growth.<sup>106</sup> These include Mexico, Turkey, Egypt, Iran, Nigeria, Bangladesh, Indonesia, South Korea, Pakistan, the Philippines, and Vietnam, among others.<sup>107</sup> Most of these countries have seen steady, at times exceptional, growth rates since 2010.<sup>108</sup> While they may have less political or geostrategic salience than the BRICs,<sup>109</sup> their rise suggests a far more diffuse power distribution and a much broader range of states with leadership potential. In Kupchan’s words, “the landscape is one in which power is diffusing and politics diversifying.”<sup>110</sup>

### B. Power Disaggregation

A second key characteristic of the emerging structure of international law is the disaggregation of power. Different states hold relative advantages with respect to different types of power. As discussed above, power comes in many forms—military, economic, and soft. Historically these different forms of power were relatively correlated. Changes in a state’s capabilities with respect to one type of power were linked to changes in other forms of power.<sup>111</sup> While there may have been lags between increased wealth and adoption of new military technologies, the various forms of power generally tracked one another.<sup>112</sup>

In the current redistribution, however, different types of power are shifting independently. The power diffusion described above has largely been

105. See FAREED ZAKARIA, *THE POST AMERICAN WORLD: RELEASE 2.0*, at 2 (2012).

106. See Jim O’Neill et al., Goldman Sachs, *How Solid Are the BRICs?*, Global Economics Paper No. 134 (2005), <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/how-solid.pdf>; see also O’NEILL, *supra* note 6, at ch. 4.

107. *Id.* Other observers draw the list of new emerging economies somewhat differently. Michael Spence identifies Botswana, Brazil, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Malta, Oman, Singapore, Taiwan, and Thailand as countries that began as “developing economies” and have enjoyed periods of sustained high growth since World War II. See SPENCE, *supra* note 78, at ch. 7. Parag Khanna describes the rise of the “second world,” in which he includes countries such as Kazakhstan, Kyrgyzstan, Uzbekistan, Mexico, Venezuela, Pakistan, Colombia, Egypt, Iran, and Malaysia, among others. See PARAG KHANNA, *THE SECOND WORLD: EMPIRES AND INFLUENCE IN THE NEW GLOBAL ORDER* (2008).

108. Int’l Monetary Fund, *supra* note 79.

109. On this point the author is grateful to Tom Wright of the Brookings Institution.

110. See KUPCHAN, *supra* note 75, at 3.

111. For a discussion of such power transitions, see PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1987).

112. For the effects of military power diffusion, see, e.g., MICHAEL C. HOROWITZ, *THE DIFFUSION OF MILITARY POWER: CAUSES AND CONSEQUENCES FOR INTERNATIONAL POLITICS* 18–65 (2010).

driven by changes in the size of states' economies. In contrast with these rapid changes in economic power, military power and soft power have proved far stickier.<sup>113</sup> With the exception of China's military expansion, there has been very little change in other states' relative military capabilities. While soft power is shifting somewhat, those shifts are counterbalancing changes in economic and military power.

Despite China's significant military growth, the United States and Europe have retained their extraordinary military superiority.<sup>114</sup> The Correlates of War Composite Index of National Capability ("CINC") is illustrative, though it may overemphasize population size.<sup>115</sup> CINC data reveals the relative consistency of U.S. material capability between 1997 and 2007 (approximately 14%),<sup>116</sup> but also a sharp increase in China's material capacity from 14% to 20%.<sup>117</sup> Other BRICs saw very little change in material capacity and relatively slow growth in military spending.<sup>118</sup> Even China's three-fold increase in military spending between 2002 and 2012 in no way rivals U.S. global military dominance.<sup>119</sup> The United States still outspends all other states in the world—"six times more than China [and] 11 times more than

113. "Sticky" here refers to persistence even in the face of changing background conditions. See G. John Ikenberry, *Conclusion: An Institutional Approach to American Foreign Economic Policy*, 42 INT'L ORG. 219, 223–24 (1988).

114. Barry Posen, *Command of the Commons: The Military Foundations of US Hegemony*, 28 INT'L SEC. 5 (2003); Joachim Hofbauer, et. al., *European Defense Trends 2013*, CSIS Defense Industrial Initiatives Group Working Paper (Dec. 2012), available at [http://csis.org/files/publication/121212\\_Berteau\\_EuroDefenseTrends2012](http://csis.org/files/publication/121212_Berteau_EuroDefenseTrends2012).

115. CORRELATES OF WAR, National Material Capabilities Dataset (v. 4.0), available at <http://www.correlatesofwar.org/COW2%20Data/Capabilities/nmc4.htm>. The six indicators used in the dataset are military expenditure, military personnel, energy consumption, iron and steel production, urban population, and total population. See David J. Singer, *Reconstructing the Correlates of War Dataset on Material Capabilities of States, 1816–1985*, 14 INT'L INTERACTIONS 115 (1987).

116. Collectively, the major European powers (Germany, France, UK, Italy, and Spain) have seen their share of material capacity decline somewhat from 11.9% to 9.1%. CORRELATES OF WAR, *supra* note 115.

117. *Id.*

118. India's material capacity increased from 6.4% to 7.4% across that decade. Brazil's capacity remained relatively constant at 2.5%. Russia's declined from 5.3% to 3.9%. *Id.* Russia's military spending more than doubled from \$37 billion in 2002 to \$81 billion in 2012. India has increased military spending from \$28.5 billion in 2002 to \$49.5 billion in 2012. Brazil has placed little emphasis on military spending, increasing its budget only from \$29.549 billion in 2002 to \$36.751 billion in 2012. STOCKHOLM INSTITUTE OF PEACE RESEARCH ("SIPRI"), Military Expenditures Database, [http://www.sipri.org/research/armaments/milex/milex\\_database](http://www.sipri.org/research/armaments/milex/milex_database) (last visited Nov. 2, 2014). This data is based on constant 2011 U.S. dollars.

119. China's actual military spending is difficult to determine and may be inaccurate. See Sam Perlo-Freeman et al., *Trends in World Military Expenditure 2012*, SIPRI Fact Sheet (Apr. 2013), available at <http://books.sipri.org/files/FS/SIPRIFS1304.pdf>. For discussion, see M. Taylar Fravel, *China's Search for Military Power*, 31 WASH. Q. 125, 127 (2008). China's military spending increased from \$52.8 billion to \$159.6 billion over the decade. See Stockholm Institute of Peace Research (SIPRI), *supra* note 121. Between 2002 and 2012, the United States also increased its spending, largely due to wars in Afghanistan and Iraq, from \$446 billion in 2002 to \$671 billion in 2012. U.S. military spending peaked in 2010 at \$720 billion. *Id.*

Russia.”<sup>120</sup> Despite Europe’s economic troubles, European states have maintained robust military spending,<sup>121</sup> such that “[n]o region or country save the United States possesses a portfolio of military capabilities and a willingness to use them comparable to those of Europe . . . .”<sup>122</sup> Ultimately, the relative stability of military power counterbalances, in part, changes in economic power.

Soft power too has proved to be a counterbalance. The United States and Europe are maintaining significant soft power advantages and, among the BRICs, it is India and Brazil—not China and Russia—that are most successfully cultivating soft power. One attempt to quantify soft power, undertaken by the British Institute for Government, offers a ranking of states by their soft power that includes (in descending order) the United States, the United Kingdom, France, Germany, Australia, Sweden, Japan, Switzerland, Canada, and the Netherlands.<sup>123</sup> Other than Brazil, which ranked 17th in the study, the BRICs were absent from the top twenty. Similarly, in 2008, the Chicago Council on World Affairs undertook a study of soft power in Asia based on survey data of the perceptions of the United States and China throughout Asia.<sup>124</sup> Survey “responses directly called into question the conventional wisdom that China was chipping into, if not over-shadowing U.S. soft power and showed that the United States continues to wield considerable soft power in the region.”<sup>125</sup>

One might expect soft power to track, again with a lag, economic power, since, as a country’s economic wealth increases, its capacity to engage in the kinds of activities that enhance soft power—building educational systems, exporting culture, etc.—increases as well.<sup>126</sup> Yet, factors beyond economic wealth are highly salient to soft power, including form of governance, culture, linguistic commonalities, perceived threat, civil society, and foreign policy choices.<sup>127</sup> These factors have constrained Chinese<sup>128</sup> and Russian ef-

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120. Laicie Heeley, *U.S. Defense Spending vs. Global Defense Spending*, CTR. FOR ARMS CONTROL AND NON-PROLIFERATION (Apr. 24, 2013), [http://armscontrolcenter.org/issues/securityspending/articles/2012\\_toplevel\\_global\\_defense\\_spending/](http://armscontrolcenter.org/issues/securityspending/articles/2012_toplevel_global_defense_spending/).

121. European collective military spending was estimated at approximately \$280 billion in 2012, still significantly more than that of China. See Hofbauer, *supra* note 114.

122. Moravcsik, *supra* note 25, at 158.

123. Because soft power is based on a wide range of variables and is generally subjective, there is no uniform methodology for its measurement. The ranking referenced here is based on a combination of standard of government, diplomatic infrastructure, cultural output, capacity for education, and appeal to business. See Jonathan McClory, *The New Persuaders II, A 2011 Global Ranking of Soft Power*, Institute for Government (Dec. 2011), available at [http://www.instituteforgovernment.org.uk/sites/default/files/publications/The%20New%20PersuadersII\\_0.pdf](http://www.instituteforgovernment.org.uk/sites/default/files/publications/The%20New%20PersuadersII_0.pdf).

124. Christopher Whitney & David Shambaugh, Chicago Council on Global Affairs, *Soft Power in Asia: Results of a 2008 Multinational Survey of Public Opinion* (2009), available at [http://www.brookings.edu/~media/Events/2008/6/17%20east%20asia/0617\\_east\\_asia\\_report.pdf](http://www.brookings.edu/~media/Events/2008/6/17%20east%20asia/0617_east_asia_report.pdf).

125. *Id.* at 2.

126. See generally NYE, *supra* note 55.

127. Every country in the Institute for Government’s top-twenty list is a democracy. For a discussion of the role of governmental forms in soft power, see NYE, *supra* note 55, at 13–14. See generally Joseph Nye, *What China and Russia Don’t Get About Soft Power*, FOREIGNPOLICY.COM (Apr. 29, 2013), <http://>

forts to build soft power.<sup>129</sup> In contrast, Brazil and India have fared better in their efforts to cultivate soft power, perhaps due to social and governmental structures more conducive to soft power accumulation.<sup>130</sup>

Ultimately, the disaggregation of power, whereby different states are gaining relative advantage in particular—but not all—types of power, serves an equalizing function in the emerging structure. No one state or even small group of states can dominate across all issue areas. Haass describes such a system as a “world dominated not by one or two or even several states but rather by dozens of actors possessing and exercising various kinds of power.”<sup>131</sup>

### C. Issue-Specific Asymmetries in Power Distribution

A third feature of the emerging structure is that power asymmetries are developing on an issue-specific basis.<sup>132</sup> The diffusion of power has not benefited all states equally. The BRICs have gained considerable power; the United States and Europe have retained significant influence. Yet, the vast majority of other states—even where they are beginning to experience economic growth—remain comparatively weak.<sup>133</sup> The result is that the United States, Europe, or a BRIC will usually have a significant power advantage in its relationship with almost all other states. Those advantages allow these states to act as hubs across a range of issues in the international legal sys-

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[www.foreignpolicy.com/articles/2013/04/29/what\\_china\\_and\\_russia\\_don\\_t\\_get\\_about\\_soft\\_power](http://www.foreignpolicy.com/articles/2013/04/29/what_china_and_russia_don_t_get_about_soft_power).

Smaller states are often able to more effectively develop and deploy soft power because they present less of a threat to their neighbors. See, e.g., KEVIN D. STRINGER, *SOVEREIGN LICHTENSTEIN: THE SOFT POWER PROJECTION OF A VERY SMALL STATE* (2013).

128. In 2007 Chinese Hu Jintao stated the goal of “enhanc[ing] . . . the soft power of our country . . . [is] a factor of growing significance in the competition in overall national strength.” See Joseph Nye & Wang Jisi, *The Rise of China's Soft Power and its implications for the United States*, in *POWER AND RESTRAINT: A SHARED VISION FOR THE US-CHINA RELATIONSHIP* 28 (Richard Rosencrance & Gu Guoliang eds., 2009). On its ineffectiveness, see Nye, *supra* note 1300 (“Polls show that opinions of China's influence are . . . predominantly negative in the United States, Europe, as well as India, Japan and South Korea.”). Africa may be an exception, though a backlash is developing. See generally *CHINA RETURNS TO AFRICA: A RISING POWER AND A CONTINENT EMBRACE* (Christopher Alden, Daniel Large & Ricardo Soares de Oliveira eds., 2008).

129. See *Russia's Soft Power Agency is Allocated More Funds*, RIA NOVOSTI, July 24, 2013, [available at](http://en.rian.ru/russia/20130724/182398836.html) <http://en.rian.ru/russia/20130724/182398836.html>. On ineffectiveness, see Fyodor Lukyanov, *Why Russia's Soft Power is Too Soft*, VALDAI DISCUSSION CLUB (July 2, 2013), <http://valdaiclub.com/politics/54660.html>.

130. Andrew Hurrell, *Brazil and the New Global Order*, 109 *CUR. HIST.* 60 (Jan. 2010); see also Paulo Sotero & Leslie Elliott Armijo, *Brazil: To Be or Not To Be A BRIC?*, 31 *ASIAN PERSPECTIVE* 43, 51–55 (2007). For a discussion of India's effective cultivation of soft power in the SAARC, see Christian Wagner, *India's Soft Power: Prospects and Limitations*, 66 *INDIA Q.* 333 (2010).

131. Haass, *supra* note 75, at 44.

132. Such asymmetries are not, themselves, new. See DAVID VITAL, *THE INEQUALITY OF STATES* (1967). What is new here is that asymmetries are flexible and issue-specific.

133. See Fareed Zakaria, *Future of American Power—How America Can Survive the Rise of the Rest*, 87 *FOREIGN AFF.* 18 (May–June 2008). For a discussion of the role of weak states in the international system, see MICHAEL HANDEL, *WEAK STATES IN THE INTERNATIONAL SYSTEM* (1990); Robert O. Keohane, *Lilliputians' Dilemmas: Small States in International Politics*, 23 *INT'L ORG.* 291 (1969).

tem.<sup>134</sup> Power asymmetries allow, for example, China to play a leadership role in its relations in South East Asia,<sup>135</sup> Russia to lead in the former Soviet space,<sup>136</sup> India to act as a leader among states in the Indian Ocean basin and within the South Asian Association for Regional Cooperation ("SAARC"), and Brazil to assume a leadership role among many South American states.<sup>137</sup>

While asymmetries are common to many structures of power, three particular features of power asymmetries in the emerging structure differentiate it from multipolar orders. First, power asymmetries operate in multiple tiers. While the United States, EU, and BRICs may benefit from power asymmetries vis-à-vis most other states, a far larger group of states, including South Korea, Japan, Turkey, Indonesia, Mexico, Nigeria, and South Africa, enjoy asymmetric power relationships vis-à-vis a third tier of states.<sup>138</sup> As a result, they too can often act as hubs within the system, particularly where that leadership is not challenged by a stronger state. Moving still further down the power hierarchy, this third tier of states, including more minor regional powers, has beneficial power asymmetries that facilitate leadership vis-à-vis yet a fourth tier of states.

Second, power asymmetries are often issue-specific. The disaggregation of power discussed above means that states with favorable asymmetries in economic power may not have similar advantages in military or soft power. States with economic power disadvantages may nonetheless have soft power advantages. Given the differential effectiveness of the conversion of the different types of power into legal influence, the disaggregation of power allows a wide range of states to benefit from issue-specific power asymmetries. In other words, even if a state is at an absolute power disadvantage vis-à-vis its partners, it may nonetheless enjoy an issue-specific power advantage that allows it to act as a hub with respect to a particular issue of international law.

Finally, in the emerging structure even states that have both absolute and comparative power disadvantages can cultivate issue-specific power advantages where they have particularly strong preferences. Comparatively weak

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134. In political science literature, these states would often be called regional hegemons, though such hegemony suggests a far more rigid, inflexible system-structure than is the case here. See MEARSHEIMER, *supra* note 46.

135. See, e.g., David Shambaugh, *China Engages Asia: Reshaping the Regional Order*, 29 INT'L SEC. 64 (2004).

136. See, e.g., BERTIL NYGREN, *THE REBUILDING OF GREATER RUSSIA: PUTIN'S FOREIGN POLICY TOWARDS THE CIS COUNTRIES* (2007).

137. See Maria Regina Soares de Lima & Monica Hirst, *Brazil as an Intermediate State and Regional Power: Action, Choice and Responsibilities*, 82 INT'L AFF. 21 (2006).

138. For discussions of the emerging power of states beyond the BRICs, see generally KHANNA, *supra* note 110; MAHBUBANI, *supra* note 78; O'NEILL, *supra* note 6. For other examples, see Adekeye Adebajo & Christopher Landsberg, *South Africa and Nigeria as Regional Hegemons*, in FROM CAPE TO CONGO: SOUTHERN AFRICA'S EVOLVING SECURITY CHALLENGES 171 (Mwesiga Laurent Baregu & Christopher Landsberg, eds., 2003); F. Stephen Larrabee, *Turkey Rediscovered the Middle East*, 86 FOREIGN AFF. 103 (July-Aug. 2007).



states with strong preferences on a particular issue may choose to channel available resources toward that issue. To the degree stronger states do not have similarly intense preferences in the same issue area, weak states that concentrate power narrowly can create asymmetries that allow them to lead on that issue. For example, Lichtenstein has evidenced a strong preference for the development of international criminal law and, despite relative weakness of power vis-à-vis almost all other states, has concentrated available military, economic, and soft power resources, serving as a driving force in the Rome negotiations of the International Criminal Court ("ICC"), playing an extremely active role within the Assembly of States Parties of the ICC, providing significant funding to the Court, and situating itself at the center of a range of international criminal law networks.<sup>139</sup> Its particular preferences have allowed it to cultivate a power asymmetry that fosters issue-specific leadership.

### III. THE STRUCTURE OF A MULTI-HUB INTERNATIONAL LEGAL SYSTEM

This Part makes a structural argument that the diffusion and disaggregation of power, along with issue-specific asymmetries in the distribution of power, give rise to a multi-hub structure of international law. This distinct structure has two broad implications for the international legal system. First, it is generating a new form of international legal pluralism through a more diverse set of ideas and substantive norms that arise from the articulation of alternative preferences by a range of states that are coming to serve as hubs of international legal processes.<sup>140</sup> Second, this multi-hub structure generates downward pressures that are shifting international legal processes from the global level of the system toward a number of separate, yet flexible, subsystems. Downward migration of legal processes, in turn, reinforces the trend toward pluralism.

The multi-hub structure of international law is distinct from past power structures. It differs from its immediate predecessor, unipolarity, because there is no single state with the ability to lead the system as a whole.<sup>141</sup> It differs from the bipolarity of the Cold War, notwithstanding the importance of the United States and China in the current system, because power is sufficiently diffuse that a wide range of other states are both capable of global influence and often indispensable to international legal processes.<sup>142</sup>

While the multi-hub system may appear to resemble traditional multipolarity, it is different in at least three critical regards. First, in a multipolar

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139. See *Lichtenstein Geht International Voran* [Lichtenstein Leads the Way Internationally], VATERLAND (Vaduz), May 5, 2012, <http://www.vaterland.li/importe/altdaten/politik/Lichtenstein-geht-international-voran;art433,77840> (describing Lichtenstein's efforts).

140. For a discussion of pluralism, see Burke-White, *supra* note 23.

141. See Jervis, *supra* note 25, at 191 (on the characteristics of a unipolar system).

142. See Waltz, *supra* note 24 (on the nature of bipolar systems).

system, the number of poles is relatively small. During the Concert of Europe, for example, there were five “Great Powers”: the Austrian Empire, France, Prussia, Russia, and the United Kingdom.<sup>143</sup> In the multi-hub system, in contrast, far more states are capable of playing leadership roles in international legal processes, ranging from the United States and Europe to the BRICs, the remaining members of the G20, and even the still emerging N-11. Second, in a multipolar system, the poles of the system are fixed and embedded into the system structure. During the Concert of Europe, for example, “the Great Power system institutionalize[d] the position of the powerful state in a web of rights and obligations” flowing out of the Congress of Vienna.<sup>144</sup> In the multi-hub structure, in contrast, the ability of states to lead international legal processes is based on issue-specific power asymmetries backed by a desire for leadership and, hence, varies from issue to issue. Third, in a multipolar structure, each pole has one or more states in its respective sphere of influence that are, essentially, subordinate to it.<sup>145</sup> In the multi-hub system, the subsystems that may develop are flexible, not fixed. In order to lead, hubs must attract other states toward their subsystems on particular issues.

#### A. *Structural Pressures Toward Pluralism*

During the period of unipolarity, the United States and Europe, independently and collectively, were sufficiently powerful that their preferences dominated the system and were, ultimately, embedded into its most fundamental rules.<sup>146</sup> There were, of course, times when alternative views gained traction, such as the New International Economic Order advanced by some developing states in the 1970s.<sup>147</sup> Yet, the transatlantic consensus generally marginalized competing preferences, at least where they presented fundamental challenges to the views of dominant powers.<sup>148</sup> In contrast, the multi-hub system incentivizes preference competition in international law.

143. On the Concert of Europe, see KISSINGER, *supra* note 28; see also GEORGE MODELSKI, *PRINCIPLES OF WORLD POLITICS* 141 (1972).

144. MODELSKI, *supra* note 143.

145. See EDY KAUFMAN, *THE SUPERPOWERS AND THEIR SPHERES OF INFLUENCE: THE UNITED STATES AND THE SOVIET UNION IN EASTERN EUROPE AND LATIN AMERICA* 11 (1976) (defining a sphere of influence as “a geographic region characterised by the high penetration of one superpower to the exclusion of other powers . . .”).

146. For example, the U.N. Charter strongly reflects the post-war preferences of the United States. See G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS 1–10* (2000).

147. See Declaration for the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201, (May 1, 1974); Makau Mutua, *What is TWAIL?*, 94 AM. SOC’Y INT’L L. PROC. 31 (2000).

148. See David Kennedy, *My Talk at the ASIL: What is New Thinking in International Law*, 94 AM. SOC’Y INT’L L. PROC. 104, 121 (2000) (discussing the dominance of particular ideas in international law). Even during the bipolar era, the United States was largely able to minimize the impact of Soviet views of international law through the control of key institutions. See Edward McWhinney, “*Peaceful Co-Existence*” and the Soviet-Western International Law, 56 AM. J. INT’L L. 951, 960 (1962).

### 1. *Proliferation of Hubs as Leaders of International Legal Processes*

Despite the formal equality of states in the international legal system, for most international legal processes, such as rulemaking, interpretation, or enforcement, a single state or small group of states often plays a catalytic role. For example, such states may convene a treaty negotiation or push an international institution to do so, articulate a particular interpretation of a legal rule, or spur compliance through sanctions. Such leadership involves the translation of military, economic, or soft power into international legal processes. When a state applies such power asymmetries to exercise leadership of an international legal process, it acts as a hub within the international legal system. Hubs serve as legal entrepreneurs with both the power and preferences to catalyze legal processes.<sup>149</sup> Hubs' relative military, economic, and soft power advantages, along with preference-based desires to lead, allow them to set the agenda for and absorb the transaction costs of legal processes.<sup>150</sup> Power asymmetries and the decision to exploit those asymmetries facilitate hubs' influences on the preferences of other states that can, in turn, increase the likelihood that the complementary interests necessary for rule creation or effective enforcement will be identified.<sup>151</sup> Ultimately, hubs can serve as focal points for alternative preferences in the system.

During the trans-Atlantic period, systemic leadership was largely, though not exclusively, performed by the United States and some key European states. In contrast, in the multi-hub structure a far greater number of states are capable of acting as hubs, including the most powerful states: the United States, Europe, Brazil, Russia, India, and China. Each has shown leadership in a wide range of issue areas and legal regimes. For example, to mention just a few, the United States has drawn on its military (and particularly nuclear) power to assume leadership in the regime governing non-proliferation by launching the Proliferation Security Initiative and, more recently, convening the Nuclear Security Summit in 2010.<sup>152</sup> The EU has become an influential hub for global competition law based both on its market size and regulatory capacity.<sup>153</sup> Similarly, Brazil and India have become hubs on the law of climate change based on their growing economic power and relevance

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149. In order to establish rules or regimes, "[p]olitical entrepreneurs must exist who see a potential profit in organizing collaboration." Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325, 339 (1982).

150. This hub leadership shares some similarities with regional hegemony. See BARRY BUZAN & OLE WAEVER, *REGIONS AND POWERS: THE STRUCTURE OF INTERNATIONAL SECURITY* 265, 410 (2003) (discussing spheres of influence); MEARSHEIMER, *supra* note 46; Miriam Prys, *Hegemony, Domination, Detachment: Differences in Regional Powerhood*, 12 INT'L STUDIES REV. 479, 482 (2010) (describing the relevance of regional powers post-Cold War).

151. For examples, see Lockwood, *supra* note 66.

152. See Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526 (2004); David Jackson, *White House: 47 Nations to Attend Obama Nuclear Summit*, USA TODAY, Apr. 6, 2010.

153. See generally Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012).

to the issue.<sup>154</sup> China is quickly becoming a hub on issues related to the law of the sea.<sup>155</sup>

Leadership is not limited to just these most powerful states. A wider group including Australia, Canada, Indonesia, Mexico, South Africa, South Korea, and Turkey can also serve as hubs, though on perhaps a more limited number of issues. South Korea, for example, has assumed such a role on issues related to the G20, catalyzing internal G20 debate on the structural evolution of the organization and leading outreach to non-member states.<sup>156</sup> Drawing on its soft power and strong issue-specific preferences, Canada serves as a hub on the development of legal rules governing landmines and small arms.<sup>157</sup> Turkey and Brazil have both sought—though with limited success—to assume leadership on the issues regarding Iran’s nuclear program and related sanctions.<sup>158</sup> South Africa, and particularly the South African Constitutional Court, has done so with respect to the interpretation and implementation of economic and social rights.<sup>159</sup>

Leadership also extends beyond this second tier of states when less powerful states have strong preferences in a particular issue area and build the asymmetric power advantages necessary for leadership on that issue. Lichtenstein’s activism in international criminal law, noted above, is a case in point. Similarly, the importance of British and Swiss banking and financial sectors allow both states to play leadership roles in the development of international banking regulation.<sup>160</sup> Kenya has emerged as a hub in the prosecution of international maritime piracy due to its geographic positioning and strong

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154. See, e.g., Sonali P. Chitre, India’s Role in an International Legal Solution to the Global Climate Change Problem, Apr. 4, 2011, available at <http://ssrn.com/abstract=1802862>; Eduardo Viola, *Brazilian Climate Policy Since 2005: Continuity, Change, and Prospective* (Centre for European Policy Studies, Working Document No. 373, 2013), available at <http://www.ceps.eu/book/brazilian-climate-policy-2005-continuity-change-and-prospective>.

155. For China’s interactions with the law of the sea, see generally Jonathan G. Odom, *A China in the Bull Shop? Comparing the Rhetoric of a Rising China with the Reality of the International Law of the Sea*, 17 OCEAN & COASTAL L.J. 201, 213 (2012).

156. Cf. Kim Sung-han, *Global Governance and Middle Powers: South Korea’s Role in the G20*, COUNCIL ON FOREIGN REL., Feb. 2013, available at <http://www.cfr.org/south-korea/global-governance-middle-powers-south-koreas-role-g20/p30062>.

157. See LLOYD AXWORTHY, NAVIGATING A NEW WORLD: CANADA’S GLOBAL FUTURE 125–55 (2003); Matthew Bolton & Thomas Nash, *The Role of Middle Power–NGO Coalitions in Global Policy: The Case of the Cluster Munitions Ban*, 1 GLOBAL POLICY 172 (2010).

158. See, e.g., Joint Declaration, Braz.-Iran-Turk., May 17, 2010, available at <http://www.theguardian.com/world/julian-borger-global-security-blog/2010/may/17/iran-brazil-turkey-nuclear>; Alexei Barionuevo & Sebnem Arsu, *Brazil and Turkey Near Nuclear Deal with Iran*, N.Y. TIMES, May 16, 2010, available at [http://www.nytimes.com/2010/05/17/world/middleeast/17iran.html?\\_r=0](http://www.nytimes.com/2010/05/17/world/middleeast/17iran.html?_r=0).

159. See, e.g., S. AFR. CONST., ch. 2 § 26–27, 1996; *Soobramoney v Minister of Health (Kwazulu-Natal 1998 (1) SA 765 (CC) (S. Afr.)*; Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 123–24 (2000).

160. On Swiss banking, see Haig Simonian, *Swiss Finish for Big Banks Wins Over Some Converts*, FIN. TIMES, Oct. 7, 2010, available at <http://www.ft.com/intl/cms/s/0/b2a376c0-d232-11df-8f8e-00144feabdc0.html#axzz3ItHQtkph>.

interests in the issue.<sup>161</sup> Even the tiny Maldives is emerging as a climate-change hub based on its own vulnerability and particularly strong preferences.<sup>162</sup>

The multi-hub structure diversifies leadership, allowing states that previously were subjected to international rule creation by more powerful states to become leaders themselves. The negotiation of bilateral investment treaties ("BITs") is illustrative. Historically, rich, capital-exporting states developed model BITs that effectively imposed their preferred terms on capital-importing states through the take-it-or-leave-it fixed terms of model treaties.<sup>163</sup> From 1959 to present, the United States and Germany, for example, entered into more than 200 BITs based on their respective models with capital-importing states.<sup>164</sup> In the multi-hub system, however, many more states have developed their own model BITs and structured their treaty negotiations around these new models. India, Russia, China, South Africa, South Korea, and Turkey, to name just a few, have recently developed their own model BITs<sup>165</sup> and have used them to lead and shape treaty negotiations, usually with still less powerful states.<sup>166</sup> As a result, BIT negotiations are reorienting from a historic "north-south" orientation to a new "south-south" orientation. By 2010, about 40% of BITs were between two developing countries, often between hubs and other states in their subsystem.<sup>167</sup>

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161. See James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416 (2010); Ryan P. Kelly, *UNCLOS, But No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 MINN. L. REV. 2285, 2300 (2011).

162. The Maldives championed the Male' Declaration on the Human Dimensions of Global Climate Change and has played a growing role in UNFCCC processes. See MALE' DECLARATION ON THE HUMAN DIMENSION OF GLOBAL CLIMATE CHANGE, REPUBLIC OF MALDIVES, Nov. 14, 2007, available at [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf); Ryan Jarvis, *Sinking Nations and Climate Change Adaptation Strategies*, 9 SEATTLE J. SOC. JUST. 447, 447 (2010–2011).

163. See Kenneth J. Vandeveld, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX & BUS. LAW 159, 170 (1993).

164. See BITs & Other IIAs – search results, INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults> (add "Germany" and "United States of America" from "Economies" section and change "Agreement filters" for "Type of agreement" to "Bilateral Investment Treaties (BITs)" then follow "Show Agreements").

165. See Indian Model Text of Bilateral Investment Promotion and Protection Agreement, available at [http://finmin.nic.in/the\\_ministry/dept\\_eco\\_affairs/icsection/Indian%20Model%20ext%20BIPA.asp](http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20ext%20BIPA.asp); Axel Berger, Ger. Dev. Inst., China's New Bilateral Investment Treaty Program: Substance, Rational [sic], and Implications for International Investment Law Making (Nov. 2008), available at [http://www.die-gdi.de/uploads/media/Berger\\_ChineseBITs.pdf](http://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf).

166. India, for example, has relied on its model BIT in treaty negotiations with Brunei (2009), Indonesia (2004), Laos (2003), Libya (2009), Myanmar (2009), Philippines (2001), Turkey (2007), Turkmenistan (2006), and Yemen (2004). See Gov't of India, List of Countries with Which Bilateral Investment Promotion and Protection Agreements are in Force, available at [http://finmin.nic.in/the\\_ministry/dept\\_eco\\_affairs/icsection/List%20of%20countries.asp](http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/List%20of%20countries.asp).

167. See Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*, 30 NW. J. INT'L & BUS. 101, 101 (2010).

China, for example, has now entered into more BITs than any other country.<sup>168</sup> In short, leadership in the multi-hub system has diversified.

## 2. *Variable Geometry Among Flexible Subsystems*

In the multi-hub structure, hubs will often be at the center of subsystems that include a number of follower states on an issue-specific basis. At times, hubs will intentionally seek to build such subsystems through formal institutions so as to advance their particular preferences, solidify their leadership positions, or reduce transaction costs of cooperation. At other times, subsystems will emerge organically as hubs attract followers to the particular preferences they advance.

Subsystems—generally described as spheres of influence—were a hallmark of traditional bipolar or multipolar orders. Those spheres of influence were embedded into the system structure based largely on the coercive military power of a pole state.<sup>169</sup> During the Cold War, for example, the North Atlantic Treaty Organization (“NATO”) and the Warsaw Pact effectively locked in U.S. and Soviet spheres of influence, respectively. Contestation of spheres of influence, such as in Korea and Vietnam, was the currency of great power rivalry.<sup>170</sup> In contrast, in the multi-hub structure, subsystems are issue-specific, flexible, and subject to change independent of great power rivalry. Only rarely in this system will any single hub have such a preponderance of military, economic, and soft power to demand that weaker or geographically proximate states follow.<sup>171</sup> Instead, when hubs seek to lead, they tend to cultivate dense, issue-specific, international legal networks radiating out from themselves.<sup>172</sup> These networks constitute the subsystems of the multi-hub structure. The scope and reach of these subsystems shift on different issues. Non-hubs may be part of different hubs’ subsystems on distinct issues in what can be termed variable geometry.<sup>173</sup>

China, Russia, and Brazil have all been extremely active in building such subsystems. China, for example, led the establishment of the Shanghai Co-

168. China has signed 125 BITs to date. See U.N. Conference on Trade and Dev., Full List of Bilateral Investment Agreements concluded, 1 June 2013, available at [http://unctad.org/Sections/dite\\_pccb/docs/bits\\_china.pdf](http://unctad.org/Sections/dite_pccb/docs/bits_china.pdf).

169. See KAUFMAN, *supra* note 145.

170. Cf. GLENN H. SNYDER & PAUL DIESING, CONFLICT AMONG NATIONS: BARGAINING, DECISION MAKING, AND SYSTEM STRUCTURE IN INTERNATIONAL CRISES 419–20 (1977) (“In a multipolar system there are . . . . In addition [to a few great powers] . . . a number of smaller states who do not play significant roles except as they serve as objects of the Great Power competition . . .”).

171. See Bremmer & Roubini, *supra* note 75 (describing the emerging world as “one in which no single country or bloc of countries has the political and economic leverage—or the will—to drive a truly international agenda”).

172. For a discussion of the role of networks in international law, see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004). As used in this paper, “network” is broader and refers more generally to the intersecting and overlapping legal relationships among states in the system.

173. See generally Haass, *supra* note 75. On variable geometry, see Stewart Patrick, *Shifting Coalitions of Consensus Rather than Blocs*, in THE NEW DYNAMICS OF SUMMITRY: INSTITUTIONAL, POLICY AND POLITICAL INNOVATIONS FOR G20 SUMMITS 38 (Colin Bradford & Wonhyuk Lim, eds., 2010).

operation Organization ("SCO") in 2002. The SCO includes China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Uzbekistan<sup>174</sup> and performs functions related to Eurasian economic and military security. It gives China a platform for regional—and perhaps global—leadership, notably excluding the United States.<sup>175</sup> China has also sought a greater role within the Association of Southeast Asian Nations ("ASEAN") by shifting the organization's activities to broader formats, such as ASEAN-Plus 3, in which it can play a leadership role.<sup>176</sup> Similarly, Russia has developed a dense network of bilateral and regional relationships with the states of the former Soviet Union to solidify its hub status in the region. Such regional agreements include the Commonwealth of Independent States, the Collective Security Treaty Organization, the Organization of Central Asian Cooperation, the Eurasian Economic Community, the Common Economic Space, and the Customs Union of Belarus, Russia and Kazakhstan.<sup>177</sup> Brazil, too, has been active in cultivating an international legal subsystem through networked legal relationships. It hosted the first IBSA (India-Brazil-South Africa) meeting in 2006.<sup>178</sup> It led the development of the Union of South American Nations ("UNASUR"), a broadly inclusive South American regional organization.<sup>179</sup> It convened the first summit of Latin American and Caribbean States on Integration and Development in 2010.<sup>180</sup> Brazil has also sought to revitalize Mercosur, the Southern Common Market, building it into both an economic and political network under Brazilian leadership.<sup>181</sup>

Hubs that construct such subsystems may hope to establish a stable set of legal relationships that might operate like a more classical sphere of influ-

174. CHARTER OF THE SHANGHAI COOPERATION ORGANIZATION June 7, 2002, available at <http://www.sectsc.org/EN123/show.asp?id=69>.

175. Member states have, at times, advocated a larger role in regional and global security for the SCO, perhaps in a more direct challenge to U.S.-dominated institutions. See Charles Tannock, *Backing Kazakhstan's 'Great Game'*, THE GUARDIAN, Feb. 18, 2008 ("There is little doubt that the SCO is an instrument for Russia and China to make the case for a multi-polar world . . . that counterbalance[s] American strategic hegemony."). In 2006, the United States was denied observer status.

176. See Kuik Cheng-Chwee, *Multilateralism in China's ASEAN Policy: Its Evolution, Characteristics, and Aspiration*, 27 CONTEMP. SOUTHEAST ASIA 102 (2005).

177. See Stephen Aris, *Russia's Approach to Multilateral Cooperation in the Post-Soviet Space: CSTO, EurAsEC and SCO*, 76/10 RUSSIAN ANALYTICAL DIGEST, Apr. 15, 2010, available at <http://www.css.ethz.ch/publications/pdfs/RAD-76.pdf>.

178. The Presidency of the Republic of South Africa, India-Brazil-South Africa (IBSA) Dialogue Forum Fifth Summit of Heads of State and Government Tshwane Declaration (*hereinafter* "Tshwane Declaration") (Oct. 18, 2011), available at <http://www.thepresidency.gov.za/pebble.asp?relid=5053>. For a Brazil-based view of the significance of IBSA, see Oliver Stuenkel, *Does IBSA Matter?*, POST-WESTERN WORLD 9 (Oct. 23, 2011), available at <http://www.postwesternworld.com/2011/10/23/does-ibsa-matter/>.

179. *South America Nations Found Union*, BBC NEWS, May 23, 2008, available at [http://news.bbc.co.uk/1/hi/newsid\\_7410000/newsid\\_7417800/7417896.stm](http://news.bbc.co.uk/1/hi/newsid_7410000/newsid_7417800/7417896.stm).

180. Salvador Camarena, *América Latina crea una OEA sin Estados Unidos*, El País, Feb. 23, 2010, at [http://internacional.elpais.com/internacional/2010/02/23/actualidad/1266879601\\_850215.html](http://internacional.elpais.com/internacional/2010/02/23/actualidad/1266879601_850215.html). See also L. American Leaders Officially Sign CELAC into Effect as New Bloc, CHINA DAILY, Dec. 4, 2011, available at [http://www.chinadaily.com.cn/xinhua/2011-12-04/content\\_4571120.html](http://www.chinadaily.com.cn/xinhua/2011-12-04/content_4571120.html).

181. See Mahrukh Doctor, *Prospects for Deepening Mercosur Integration: Economic Asymmetry and Institutional Deficits*, 20 REV. INT'L POL. EC. 515 (2013).

ence.<sup>182</sup> Yet, the diffuse nature of power in the multi-hub system ensures that subsystems generally remain both flexible and issue specific. Other hubs may offer up their own issue-specific institutions or legal relationships as an alternative to those created by the first hub. Non-hubs may be able to navigate between different subsystems, perhaps being part of many simultaneously. Unlike traditional spheres of influence that were generally geographically bounded, non-hubs may be able to follow even physically distant hubs outside their immediate geographic regions where interests align. The result is soft competition among hubs through issue-specific variable geometry.

This variable geometry is evident in the current negotiation of regional trade arrangements in the Asia-Pacific. Both the United States and China have backed different negotiating structures that frame the trade subsystem differently. The United States has championed the Trans-Pacific Partnership ("TPP"), whose membership crisscrosses the Pacific, including Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States. Notably, this excludes China.<sup>183</sup> In contrast, China has backed the Regional Comprehensive Economic Partnership ("RCEP"), which includes all ten ASEAN states as well as Australia, China, India, Japan, South Korea, and New Zealand.<sup>184</sup> While the RCEP format includes multiple hubs, it specifically excludes the United States, thereby increasing China's negotiating leverage. These two different frameworks in the region generate a soft and non-exclusive legal competition among hub-based subsystems.

The shifting boundaries and flexibility of subsystems are also evident in Russia's experiences in the Eurasian space. Russia sought to redefine the subsystems in Europe through a 2008 proposal for a European Security Treaty that would have shifted the locus of Europe's security architecture from NATO and the Organization for Security and Co-operation in Europe ("OSCE") to a broader format that includes Russia as an equal.<sup>185</sup> While the effort was unsuccessful, it signals that, at times, Russia will see itself as part

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182. See Andrei P. Tsygankov, *Russia's Power and Alliances in the 21st Century*, 30 *POLITICS* 43 (2010) (on Russia's ambitions in the former Soviet space).

183. See OFFICE OF THE U.S. TRADE REP., *THE UNITED STATES IN THE TRANS-PACIFIC PARTNERSHIP*, available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership>. For discussion of the geostrategic consequences, see David Pilling and Shawn Donnan, *Transpacific Partnership: Ocean's Twelve*, *FIN. TIMES* (Sept. 22, 2013).

184. See Murray Hiebert & Liam Hanlon, *ASEAN and Partners Launch Regional Comprehensive Economic Partnership*, CTR. FOR STRATEGIC AND INT'L STUDIES (Dec. 7, 2012), available at <http://csis.org/publication/asean-and-partners-launch-regional-comprehensive-economic-partnership>.

185. See Richard Weitz, *The Rise and Fall of Medvedev's European Security Treaty*, The German Marshall Fund of the United States (May 29, 2012), available at <http://www.gmfus.org/archives/the-rise-and-fall-of-medvedevs-european-security-treaty/>; Dmitry Medvedev, *Berlin Speech at Meeting with German Political, Parliamentary, and Civic Leaders*, June 5, 2008, available at [http://archive.kremlin.ru/eng/speeches/2008/06/05/2203\\_type82912type82914type84779\\_202153.shtml](http://archive.kremlin.ru/eng/speeches/2008/06/05/2203_type82912type82914type84779_202153.shtml).



of a broader European subsystem and, at times, a distinct hub itself.<sup>186</sup> On its Asian border, Russia recognizes the benefits of flexible subsystems. It addresses military and security issues in this subsystem through the Moscow-dominated Collective Security Treaty Organization ("CSTO").<sup>187</sup> In contrast, on many economic issues where China's participation is necessary and helpful, Russia draws the boundaries more broadly and works within the Chinese-led Shanghai Cooperation Organization.<sup>188</sup> Despite recent military efforts in Georgia and Ukraine, Russia has not been able to lock in a fixed sphere of influence, and actually benefits from the flexibility of the subsystems in Eurasia.

Critically, competition among hubs and variable geometry among subsystems *empowers* non-hubs with choices as to which hub to follow on any given issue. For example, despite China's significant economic power advantage, Singapore can decide whether to be part of the U.S.-led TPP, the Chinese-led RCEP, or both. Peru may choose among Mercosur, the TPP, or both. Kazakhstan, notwithstanding its relative weakness compared to both Russia and China, may be part of both the Chinese-led SCO and the Russian-led CSTO. Even where one state, such as China, may have a significant power advantage in a relevant issue area, weaker states still have the possibility of reaching across subsystems in their legal relations. For example, in recent years Vietnam has sought to join more closely with the U.S. hub by means of trade, investment, maritime-transport, and air-transport agreements,<sup>189</sup> presumably to balance against Chinese regional dominance.<sup>190</sup>

Similarly, smaller states may be empowered to shift the framing of an international legal process outside any particular hub's subsystem. In January 2013, the Philippines initiated a case before the International Tribunal for the Law of the Sea in an effort to institutionalize maritime disputes with

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186. See Philip H. Gordon, Assistant Sec'y, Bureau of European and Eurasian Affairs, State Department, Briefing on Transatlantic Meetings and NATO-Russia Council Meeting (Sept. 22, 2010), *available at* <http://www.state.gov/p/eur/rls/rm/2010/147600.htm>.

187. See Charter of the Collective Security Treaty Organization, Oct. 7, 2002, *available at* [http://www.odkb-csto.org/documents/detail.php?ELEMENT\\_ID=1896](http://www.odkb-csto.org/documents/detail.php?ELEMENT_ID=1896). The Collective Security Treaty Organization, largely an intergovernmental military alliance, includes Armenia, Belarus, Kyrgyzstan, Russia, Tajikistan, and Uzbekistan. See Alexander Frost, *The Collective Security Treaty Organization, the Shanghai Cooperation Organization, and Russia's Strategic Goals in Central Asia*, 7 CHINA & EURASIA FORUM Q. 83, 86 (2009) (describing Russia's strategic goal in the CSTO as "creating dependency in Central Asian governments"); Aris, *supra* note 177, at 2 ("Moscow has successfully managed to keep . . . strategic areas of cooperation within CSTO . . . while at the same time benefiting from tying itself to the resources and international standing of China in SCO").

188. For a discussion of simultaneous Sino-Russian cooperation and competition, including institutional forum shopping, see BOBO LO, *AXIS OF CONVENIENCE* 112 (2008) (describing Russian preferences to develop security ties in Eurasia via the CSTO); Aris, *supra* note 177; Richard Weitz, *Superpower Symbiosis: The Russia-China Axis*, 175 WORLD AFF. 71 (2012).

189. See *U.S.-Vietnam Relations*, EMBASSY OF THE UNITED STATES IN HANOI, VIETNAM, <http://vietnam.usembassy.gov/usvnrelations.html> (last modified Feb. 14, 2014).

190. See generally Munir Majid, *Southeast Asia Between China and the United States*, in *THE NEW GEOPOLITICS OF SOUTHEAST ASIA* 21, 33 (Nicholas Kitchen, ed. 2012) ("Hanoi sees its new naval association with the US as a help . . . . [T]he idea is to increase the number of nations with a stake in a peaceful Southeast Asia.").

China, thereby stepping outside of China's subsystem.<sup>191</sup> Similarly, Vietnam has proposed a multinational process to develop a "code of conduct" among territorial claimants in the region that would allow weaker states to more effectively balance against China.<sup>192</sup> In international trade law, smaller or weaker states have become more willing to bring cases to the World Trade Organization ("WTO"), even against more powerful hubs, presumably in an effort to redress power asymmetries in a global institutional context outside any particular subsystem.<sup>193</sup>

### 3. *The Increasing Salience of Leadership Through Preference Attraction*

In order for hubs to advance their preferences in the international legal system, they need followers. Hubs must create incentives for other states to follow them. Successful conclusion of international legal processes generally requires agreement by two or more states. Multilateral or plurilateral treaty negotiations or the application of multilateral sanctions may require the consent of a significantly larger group.<sup>194</sup> Hubs must, therefore, bring other states along with them. For example, if the United States seeks a trans-Pacific trade agreement, it must attract states on the Pacific Rim to negotiate such an agreement. When Canada sought an international legal rule prohibiting landmines, it needed other states to come to Ottawa to negotiate and ratify the Ottawa Convention.<sup>195</sup> Historically, leading states have used military coercion, economic compulsion, and interest compatibility to cultivate such followers. All of these mechanisms remain available in the multi-hub structure, but this new structure alters their relative weight and effectiveness in ways that promote pluralism.

In traditional bipolar or multipolar structures, coercion—usually through military force or security guarantees—was often critical to the ability of poles to recruit and maintain followers.<sup>196</sup> For example, the United States led the creation of the NATO alliance and the international legal treaty that

191. See *China Rejects U.N. Arbitration of Maritime Dispute*, ASSOCIATED PRESS, Feb. 19, 2013. For a discussion of the dispute, see generally Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status and Implications*, 107 AM. J. INT'L L. 98 (2013).

192. See *Vietnam Urges S. China Sea Code of Conduct to Benefit "Entire World,"* KYODO NEWS INT'L, Sept. 28, 2013, available at <http://www.globalpost.com/dispatch/news/kyodo-news-international/130928/vietnam-urges-s-china-sea-code-conduct-benefit-entire->.

193. See generally Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 J. OF POLITICS 1033, 1033 (2009); Keohane, *Lilliputians' Dilemmas*, *supra* note 133.

194. On the different dynamics of bilateral and multilateral treaties and the universal aspirations of multilateral treaties, see Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 332–34 (2008).

195. See Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561, 588 (2003) (noting "Canada presented a striking example of middle power leadership . . .").

196. See KAUFMAN, *supra* note 145, at 10–11. Such guarantees were provided through the North Atlantic Treaty Organization and the Warsaw Pact, among other legal arrangements.

undergirds it by offering military protection.<sup>197</sup> So too did the Soviet Union through the Warsaw Pact, at times applying force as well as offering protection to bring states into a military alliance through an international legal agreement.<sup>198</sup> In the multi-hub structure, however, in light of the declining role of military power generally, coercion is likely to be a less effective strategy.<sup>199</sup> Security guarantees may remain salient, but the circumstances in which military force will be used or threatened in order to maintain an international legal subsystem are few.

The use of economic inducements, rents, or side payments has long been, and will continue to be, a strategy used by leading states to compel followers.<sup>200</sup> Historically, as particularly evident during the Cold War, smaller states have extracted rents in exchange for loyalty.<sup>201</sup> Economic compulsion, however, becomes more challenging and has increasing coordination costs in the multi-hub structure. In a traditional multipolar order, the rigidity of the structure and the relatively small number of states on the boundaries of fixed spheres of influence that could credibly shift alliances meant that only a few such side deals needed to be cut to result in comprehensive, committed followers.<sup>202</sup> In contrast, in the multi-hub structure, almost all non-hubs can shift their loyalties to follow a number of different hubs. For economic compulsion to be effective, side payments must be made to a much larger number of states, each of which has more choices and, hence, may be able to extract higher rents. Moreover, in the multi-hub system, alliances are rarely comprehensive and leadership is often issue-specific. Instead of being able to cut a single, comprehensive deal with a potential follower, hubs must negotiate numerous side payments on individual issues. As a result, while economic compulsion and side payments will still be relevant, particularly for states with significant economic power advantages,<sup>203</sup> they will be more costly to negotiate, implement, and monitor.

In contrast with the declining utility of military coercion and the increased costs of economic compulsion, the compatibility of preferences be-

197. TIMOTHY P. IRELAND, *CREATING THE ENTANGLING ALLIANCE: THE ORIGINS OF THE NORTH ATLANTIC TREATY ORGANIZATION* 3–4 (Greenwood Press 1981).

198. Douglas A. MacGregor, *Uncertain Allies? East European Forces in the Warsaw Pact*, 38 *SOVIET STUDIES* 227 (1986).

199. See generally MUELLER, *supra* note 65.

200. See Randall L. Schweller, *Bandwagoning for Profit: Bringing the Revisionist State Back In*, 19 *INT'L SEC.* 72, 88–92 (1994).

201. *Id.* (documenting such behavior over the past 500 years). On general dynamics, see Stephen M. Walt, *Alliance Formation and the Balance of World Power*, 9 *INT'L SEC.* 3, 29–31 (1985). Examples abound, ranging from payments by the UK to Malta for the use of military bases after a Maltese threat to switch allegiances to the USSR, or U.S. military assistance to Jordan after a similar threat in 1963. See, e.g., John Dowdall, *The Political Economy of Malta: The Economics of Mr. Mintoff's Independence*, 62 *ROUND TABLE: COMMONWEALTH J. INT'L AFF.* 465 (1972); Anne Mariel Peters & Pete W. Moore, *Beyond Boom and Bust: External Rents, Durable Authoritarianism, and Institutional Adaptation in the Hashemite Kingdom of Jordan*, 44 *STUD. COMP. INT'L DEV.* 256 (2009).

202. See generally KAUFMAN, *supra* note 145.

203. For a discussion, see Lockwood, *supra* note 66.

tween hubs and potential followers has increased salience in the multi-hub structure. In bipolar and multipolar orders, there were relatively few sets of competing preferences that were, usually, linked in crosscutting ideological camps.<sup>204</sup> In the multi-hub structure, the far larger number of hubs and the variable geometry of subsystems allow non-hubs to make issue-specific choices among the preferences being articulated by different hubs. With more choices and greater freedom, non-hubs can choose to follow hubs whose preferences more closely align with their own. For hubs seeking to attract followers, articulating an attractive set of preferences becomes more important to leadership. On net, the articulation of compatible preferences will often be far less costly to hubs than would be economic compulsion, at least to the degree that the hub does not have to change its own preferences to attract followers.

In the multi-hub structure, choices as to which hub to follow will often reflect distinct preferences. In the Asia-Pacific trade context, for example, the TPP and the RCEP represent two distinct substantive visions of free trade: "The TPP aims to be a high quality preferential trade agreement with few exemptions and extensive regulatory alignment. . . . The RCEP, on the other hand . . . makes limited demands for regulatory harmonisation."<sup>205</sup> The result is "geopolitical competition between the ASEAN and US proposals" that gives non-hubs some degree of choice as to the preferred normative content of their trade relations.<sup>206</sup> It is, presumably, in Vietnam's economic interests to be part of the Chinese-led RCEP, but Vietnam may simultaneously be attracted to the U.S.-led TPP because the deeper commitments of that agreement may better reflect its preferences.

The choice among such preferences is also illustrated by the current interpretative conflict between the United States and China over a key provision of the United Nations Convention on the Law of the Sea ("UNCLOS").<sup>207</sup> The United States maintains that UNCLOS allows non-aggressive foreign military presence within another state's Exclusive Economic Zone ("EEZ"),<sup>208</sup> whereas China interprets UNCLOS as barring such activities.<sup>209</sup>

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204. For a discussion of past ideological conflicts and choices among the relevant ideologies, see FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

205. Mark Thomson, *Trade Partnership Competition: TPP vs RCEP*, *THE STRATEGIST* (Apr. 16, 2013), <http://www.aspistrategist.org.au/trade-partnership-competition-tpp-vs-rcep/>.

206. *Id.*

207. UNCLOS gives coastal states "sovereign rights for the purpose of . . . managing the natural resources" within the EEZ, but requires them to "have due regard to the rights and duties of other States." United Nations Convention on the Law of the Sea art. 56, Dec. 10, 1982, 21 I.L.M. 1261 [hereinafter UNCLOS]. The Convention gives coastal and non-coastal states rights to freedom of navigation and over-flight within other states' EEZs. *Id.* at art. 58.

208. The United States recognizes UNCLOS as customary international law, though it has refused to ratify the agreement. See Statement on United States Oceans Policy, 1 PUBLIC PAPERS OF THE PRESIDENTS 378 (Mar. 10, 1983). The United States asserts a broad right for foreign military activities in other states' EEZs, rooted in the idea of freedom of navigation. See Stephen Groves, *Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms*, HERITAGE

While both interpretations are plausible,<sup>210</sup> the U.S. interpretation has long been supported by scholarly and judicial opinion.<sup>211</sup> China, however, is advancing an alternative interpretation and its position is attracting followers. In 2009, a U.S. Navy ocean surveillance vessel was challenged by Chinese warships while conducting mapping exercises in China's EEZ.<sup>212</sup> Both the United States and China justified their actions under UNCLOS.<sup>213</sup> While historically the United States would have likely prevailed in such a dispute, today other states are weighing in, precisely because China's interpretation better suits their own preferences. For example, Brazil, India, and Malaysia have made public statements or formal declarations siding, at least in part, with China.<sup>214</sup> Each of these states has interests in the protection of its (usually quite extensive) EEZ that makes China's narrower interpretation of allowable foreign military activities more compatible with its own interests. In contrast, several European states, with fewer concerns about foreign military activities in their (generally much smaller and more protected) EEZs, have backed the U.S. interpretation.<sup>215</sup>

Even in the multi-hub structure, economic compulsion and preference attractiveness will be interconnected, but the growing diversity of preferences being articulated and the choices non-hubs have amongst the preferences of different hubs makes preference attractiveness more significant. The recent effort by the BRICS (Brazil, Russia, India, China, and South Africa) to establish a new development bank and reserve fund is illustrative, even within the economic sphere itself. Due in part to frustration at the slow pace of IMF and World Bank reform,<sup>216</sup> at their March 2013 summit the BRICS committed to the creation of a BRICS development bank and reserve fund<sup>217</sup>

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FOUND. (Aug. 24, 2011), <http://www.heritage.org/research/reports/2011/08/accession-to-un-convention-law-of-the-sea-is-unnecessary-to-secure-us-navigational-rights-freedoms>.

209. For an official Chinese interpretation, see Ma Zhaoxu, Spokesperson, Ministry of Foreign Affairs of the People's Republic of China, Press Conference (Mar. 10, 2009), available at <http://fmprc.gov.cn/zflt/eng/fyrth/t541713.htm> ("[B]y engaging in activities in China's exclusive economic zone in the South China Sea without China's permission, [the U.S. ship] broke relevant international law . . ."). See also Michael Carr, *China and the Law of the Sea Convention*, 9 AUSTL. J. CHINESE AFF. 35, 35-36 (1983).

210. See Jing Geng, *The Legality of Foreign Military Activities in the Exclusive Economic Zone Under UNCLOS*, 28 MERKOURIOS 22, 25 (2012).

211. See *Corfu Channel (U.K. v Alb.)* 1949 I.C.J. 4, 22 (recognizing that the peaceful passage of warships was a "general and well-recognized principle"); Odom, *supra* note 155, at 213.

212. See Geng, *supra* note 210, at 21, 23.

213. See Vaudine England, *Who's Right in South China Sea Spat?*, BBC NEWS (Mar. 13, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/7941425.stm>.

214. See *generally* *Declarations and Statements*, OCEANS AND LAW OF THE SEA, [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm) (last modified Oct. 29, 2013). The Brazilian declaration provides: "[T]he provisions of the Convention do not authorize other States to carry out . . . military exercises or manoeuvres . . . [in the exclusive economic zone] without the consent of the coastal State." *Id.*

215. These include Italy, Germany, the Netherlands, and the UK. See Geng, *supra* note 210, at 26.

216. Cf. Robert Wade, *Emerging World Order? From Multipolarity to Multilateralism in the G20, the World Bank, and the IMF*, 39 POL. & SOC'Y, 347, 359 (2011).

217. See Andrew England, *BRICS Agree to Create Development Bank*, FIN. TIMES (Mar. 27, 2013).

“in direct challenge to the World Bank and the IMF respectively.”<sup>218</sup> While the BRIC Summit Communiqué frames these efforts as “complement[ing]” and “supplement[ing]” existing institutions, the pledged \$100 billion reserve fund would offer a viable alternative to the IMF and the World Bank.<sup>219</sup> For non-hubs, particularly in Africa, the new development bank and reserve fund could offer significant financial benefits. China certainly had the economic ability to offer such benefits and secure followers unilaterally. But, by establishing the bank and fund under the auspices of the BRICS, China could make its efforts less threatening to potential followers by placing it within the frame of an alternative, collective preference set for reduced conditionality in development assistance. For many non-hubs, these compatible preferences, along with potential economic benefits, are powerful motivation to follow.

Ultimately, in the multi-hub structure of international law, the increasing number of hubs and potential hubs, the variable geometry among flexible and overlapping subsystems, and the increasing salience of attracting followers through compatible preferences promote a particular version of international legal pluralism. Specifically, multiple hubs have both the opportunity and incentives to articulate and advance distinct preferences in the international legal system that further their own interests and attract followers. These preferences can no longer be frozen out or marginalized by a single hegemon or small group of pole states. As a result, the number and range of preferences—perhaps even normative visions—being expressed in international legal processes and shaping international legal norms is increasing. In contrast with suggestions that we have reached the “end of history”<sup>220</sup> or the beginning of a “post-ontological era,”<sup>221</sup> the multi-hub structure suggests instead the beginning of a new era of international legal pluralism. Part IV tracks the development of this pluralism at three key tension points.

### *B. Downward Structural Pressures in the Multi-hub System*

Beyond the promotion of pluralism, the multi-hub structure also generates structural pressures that favor international legal processes that take place within the confines of specific subsystems. In the multi-hub system, processes such as treaty negotiation and rule interpretation will often be more difficult to undertake on a truly multilateral or global basis where they seek to include all or most states. In contrast, such processes are becoming

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218. Sonia Rolland, *The BRIC Contributions to the Architecture and Norms of International Economic Law*, 107 AMER. SOC'Y INT'L L. PROC. 164, 167 (2013).

219. See Fifth BRICS Summit Declaration and Action Plan, BRICS 2013, at paras. 9, 10 (Mar. 27, 2013); Interview with Sanjaya Baru, in New Delhi, India, (Aug. 27, 2013).

220. See FUKUYAMA, *supra* note 204, *passim*.

221. See THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995) (suggesting that international law was entering a “post-ontological era”).

easier when confined within specific subsystems. These new structural pressures pull legal processes down toward the sub-systemic level, in turn, reinforcing the emergence of pluralism in and across subsystems.

### 1. *Solving the Coordination Problem in the Multi-hub System*

Many international legal processes require solving a coordination problem so that states can cooperate around mutual interests.<sup>222</sup> To solve the coordination problem, whether in the conclusion of an international treaty, the interpretation of a legal rule, or the imposition of multilateral sanctions, states need to gain information about one another's interests and, subsequently, identify common interests. Where they are successful, they will cooperate, because they "receive higher payoffs if they engage in identical or symmetrical actions than if they do not."<sup>223</sup> On net, the diffusion, disaggregation, and asymmetric distribution of power in the multi-hub system make solving this coordination problem far more difficult for international legal processes undertaken at the global level. Yet, these same power shifts often decrease the costs of cooperation within particular subsystems.

The increasing difficulty of the coordination game at the global level has many causes, some of which preexist the emergence of a multi-hub structure of international law. For example, the sheer number of states in the system has increased. U.N. membership is illustrative. In 1945 there were only 51 original members of the U.N.; by 2011 there were 193.<sup>224</sup> More players, on net, increase the challenge of the coordination game.<sup>225</sup> In addition, many institutions and rule-making processes have moved toward consensus requirements, beyond simple majority voting, again increasing coordination costs.<sup>226</sup>

Two particular features of the multi-hub structure further exacerbate the challenges associated with global legal processes, while making those that take place at the sub-system level easier to achieve. First, power diffusion has increased the number of states whose participation in the coordination game is necessary for global legal processes to be effective. Historically, regardless

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222. On international law as a coordination game, see Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1857 (2002) (discussing how "states cooperate to resolve . . . coordination games").

223. See GOLDSMITH & POSNER, *supra* note 18, at 12.

224. *Growth in United Nations Membership, 1945-Present*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml>.

225. See MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION* (1965). When the relevant group of actors grows, "the farther it will fall short of providing an optimal supply of a collective good," *id.* at 48. "[U]nless the number of individuals in a group is quite small . . . rational, self-interested individuals will not act to achieve their common or group interests." *Id.* at 2. See also Goldsmith & Posner, *supra* note 222 (suggesting that with large numbers of players, the prisoners' dilemma game becomes more difficult to solve); cf. George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 554-55 (2005).

226. See Blum, *supra* note 194, at 340-41.

of the total number of states, a small—though not always consistent—group of states has had disproportionate influence.<sup>227</sup> Power diffusion makes more states relevant to global international legal processes. Today, for almost any issue of global salience, the United States, Europe, BRICs, members of the N-11, and the remaining G-20 states will likely have to be included. On some issues, such as climate change, the number of indispensable states is even higher. This increase in the number of relevant states—not just the absolute number of states—increases the transaction costs of sharing information about state preferences and, hence, achieving cooperation at the global level.

The increasing number of necessary states often leads to gridlock as the probability that relevant states will have overlapping or compatible interests decreases.<sup>228</sup> In contrast, within particular subsystems, the overall number of states is smaller, decreasing the transaction costs of international legal process. Moreover, such subsystems often exist precisely because of prior interest compatibility, which increases the likelihood that overlapping interests can be easily identified and acted upon. As a result, the costs of legal processes confined within such subsystems will often be far lower than the costs of global alternatives.

A second feature of the multi-hub system that exacerbates the challenges of global level legal processes is the changing nature of leadership. In the prior unipolar structure, the hegemon facilitated global international legal processes by absorbing the costs of rule creation, providing side payments or benefits to states that accepted a rule, or imposing costs on states that did not.<sup>229</sup> In the multi-hub structure, the lack of a global hegemon makes it less likely that any state will be able and willing to assume the rising coordination costs of global international legal processes.<sup>230</sup> In contrast, within

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227. In the creation of customary rules these are termed “specifically affected” states. See *North Sea Continental Shelf* (Fed. Repub. Ger. v. Den. & Neth.), 1969 I.C.J. 3, 72 (Feb. 20, 1969); see also CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 155 (1968) (“Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.”).

228. See, e.g., THOMAS HALE, DAVID HELD & KEVIN YOUNG, *GRIDLOCK: WHY GLOBAL COOPERATION IS FAILING WHEN WE NEED IT MOST* 1 (2013); Kenneth A. Oye, *Explaining Cooperation Under Anarchy*, in *COOPERATION UNDER ANARCHY* 1, 18 (Kenneth Oye ed., 1986) (explaining that “the prospects for cooperation diminish as the number of players increases”); MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* 12 (1987) (on “the increased [challenges] of conditional cooperation”).

229. See Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175, 183 (1993) (“Treaty making is not purely consensual . . . Negotiations are heavily affected by the structure of the international system, in which some states are much more powerful than others.”). On the role played by a hegemon or regional hegemon, see Robert O. Keohane, *The Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967–77*, in *CHANGES IN THE INTERNATIONAL SYSTEM* 131 (Ole R. Holsti, et. al., eds., 1980). Moreover, the hegemon may have incentives to create rules in an effort to decrease the long-term costs of hegemony or to legitimate its position. See G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* (2001); Krisch, *supra* note 7.

230. See Keohane, *supra* note 149, at 326 (“[F]ragmentation of power is associated with regime collapse.”).



particular subsystems, a hub often has the capacity, wealth, and power to set the agendas for international legal processes and absorb the far lower transaction costs of subsystem-level legal processes.<sup>231</sup> The hub may also be able to expand the coalition beyond those states that would join organically based on common interests through side payments that result in broader win-sets. Finally, the growing number of hubs and the subsystems they are creating increases the availability of subsystemic alternatives to global cooperation.

While structural pressures in the multi-hub system favor cooperation at the subsystem level,<sup>232</sup> whether any particular international legal process remains global or migrates toward separate subsystems depends on an issue-specific calculation of the marginal costs and benefits of a single global solution as opposed to multiple, subsystemic ones. Where the marginal costs associated with a global level legal process outweigh the marginal benefits of a global solution, international legal processes are likely to shift toward separate subsystems. In contrast, where the marginal costs of a global legal process remain low or where the benefits of global cooperation significantly outweigh those of cooperation within subsystems, international legal processes may remain at the global level, but face new challenges.

TABLE 2: STRUCTURAL SHIFTS IN INTERNATIONAL LEGAL PROCESSES

		<i>Marginal benefits of global processes</i>	
		<i>Low</i>	<i>High</i>
<i>Marginal costs of global legal processes</i>	<i>High</i>	<i>Box 1: International trade</i> Shifts toward subsystems. Number of cases increasing.	<i>Box 2: Climate change</i> Remains global. Possibility of success declines.
	<i>Low</i>	<i>Box 3: Human rights</i> Shifts toward subsystems.	<i>Box 4: Financial regulation</i> Remains global. Possibility of success remains.

The variable impact of these structural pressures on different legal regimes is illustrated in Table 2. In Box 1, the costs of truly global legal processes have increased more than the benefits, shifting legal processes toward separate subsystems. The failure of the Doha round of international trade negotiations and the rapid expansion of regional trade agreements are illustrative. The participation of 142 states in the Fourth Ministerial Confer-

231. See Miriam Prys, *Hegemony, Domination, Detachment: Differences in Regional Powerhood*, 12 INT'L STUDIES REV. 479, 482 (2010) (describing the relevance of regional powers in the post-Cold War era).

232. There are, of course, some countervailing forces in the multi-hub system that might improve the prospects for global cooperation. For example, the development of new technologies may decrease the costs of preference identification, and hubs themselves may be able to serve a coordination function, such that where they agree with one another each can bring along a larger group of follower states.

ence of the Doha Round was unwieldy.<sup>233</sup> On key issues, interests of powerful states were divided and hubs served as foci for distinct interests.<sup>234</sup> Moreover, declining U.S. hegemony exacerbated by ineffective negotiation formats undermined U.S. leadership.<sup>235</sup> In contrast, trade negotiations at the subsystem level—ranging from Mercosur and North American Free Trade Agreement (“NAFTA”) to the Common Market for Eastern and Southern Africa (“COMISA”) and the South Asian Association for Regional Cooperation (“SAARC”)<sup>236</sup>—have been far easier to conclude. While there might be greater benefits from a global agreement, the marginal costs of achieving that agreement have proved too high,<sup>237</sup> resulting in the stagnation of global level trade negotiation and a pronounced shift toward subsystemic trade negotiation.<sup>238</sup>

In Box 2, the benefits of global cooperation are significantly greater than the benefits of cooperation at the subsystem level, but the costs of global cooperation are high. The result is that international legal processes likely remain global, but prospects for success decline. International climate change negotiations are illustrative. Given the collective action problems associated with global warming, reaping the benefits of cooperation requires near-universal participation by the major emitting states, yet coordination among those states has become extremely difficult. The United Nations Framework Convention on Climate Change (“UNFCCC”) process has been complicated by the involvement of an extremely large number of states with divergent interests.<sup>239</sup> In order for any deal to be reached, the negotiating structure had to shift from the plenary format to a small back-room discussion among the United States, China, Brazil, India, and South Africa.<sup>240</sup> Even this smaller group, however, had divergent interests, resulting in the imprecision of the Copenhagen Accord itself.<sup>241</sup> Small island states with

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233. See Raj Bhala, *Doha Round Schisms: Numerous, Technical, and Deep*, 6 LOY. U. CHI. INT’L L. REV. 5, 168–69 (2008) (according to the American Trade Representative, “the complexity of the cathedral that was built for the Doha Round was its own worst enemy”).

234. On irreconcilable interests of negotiating states, see generally *id.*

235. *Id.* at 158 (noting the United States was effectively “outmaneuvered”).

236. SAARC Agreement on Trade in Services was signed at the Sixteenth SAARC Summit held in Thimphu in April 2010. S. Asian Ass’n for Regional Cooperation [SAARC], *Thimphu Siler Jubilee Declaration* (Apr. 28–29, 2010), available at <http://www.saarc-sec.org/userfiles/16thSummit-Declaration29April10.pdf>.

237. See ROBERT HOWSE & MICHAEL TREBILCOCK, *THE REGULATION OF INTERNATIONAL TRADE* (2005); Songjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT’L L.J. 419 (2001); James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421 (2011).

238. See Christina L. Davis, *Overlapping Institutions in Trade Policy*, 7.1 PERSP. ON POL. 25 (2009) (arguing that enforcement may remain global at the WTO with respect to trade disputes).

239. See Daniel Bodansky, *The Copenhagen Climate Change Conference: A Postmortem*, 104 AM. J. INT’L L. 230, 234 (2010).

240. See *id.*

241. See *id.* at 240. For a perspective on China’s more vocal role in Copenhagen and its distinct preferences, see Paul G. Harris, *China and Climate Change: From Copenhagen to Cancun*, 40 ENVTL. L. REP. 10858, 10858 (2010). The Copenhagen Accord exhibits extremely low levels of precision. See Copenhagen Accord, *supra* note 3.

unique and strongly held preferences, which historically played relatively minor roles in international rule creation, ended up blocking the UNFCCC's "adoption" of the Accord.<sup>242</sup> Ultimately, despite efforts to find consensus, the international legal processes of climate change are likely to remain global, but, quite possibly, fail.

In Box 3, the relative costs of global processes are extremely high and the unique benefits of global cooperation relatively low. Much of the enforcement of international human rights law falls into this category. Regional enforcement mechanisms have provided adequate benefits and are significantly easier to establish than are global alternatives.<sup>243</sup> Given concerns about relativism, there are perhaps sufficient benefits to universal human rights rulemaking, that efforts have continued at the global level but have been supplemented by easier to conclude regional agreements.<sup>244</sup>

Finally, in Box 4, global cooperation provides unique and highly valued benefits that significantly outweigh the marginal costs thereof. This is perhaps best illustrated by global financial regulation after the 2008 financial crisis.<sup>245</sup> In that case, the marginal benefits of a global response were extremely high. Moreover, because of common interests and the ability of a relatively small number of states (the G20) to effectively make rules and policy other states would follow, the marginal costs of global action were relatively low.<sup>246</sup> As a result, international legal processes remained global and successful global outcomes were achieved. This category is, however, likely to shrink given the structural dynamics of the multi-hub system, as illustrated by the greater difficulties the G20 has faced as the common interests immediately following the 2008 crisis have diminished.<sup>247</sup>

These structural pressures will have differential impact within particular issues and legal regimes based on the relative costs and benefits of global and subsystemic legal processes. As a general matter, however, the multi-hub system favors international legal processes that are confined within particular flexible subsystems. Over time, it is likely that more rulemaking, interpretation, and enforcement will migrate toward these subsystems, complementing and reinforcing the trend toward international legal pluralism.

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242. See generally Bodansky, *supra* note 239.

243. For examples of such regional enforcement and discussion of the regionalization of human rights regimes, see Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285 (1999); Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN ST. L. REV. 679 (2004).

244. Compare JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2013), with FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* (2012).

245. See Andrew F. Cooper, *The G20 as an Improvised Crisis Committee and/or a Contested 'Steering Committee' for the World*, 86 INT'L AFF. 741 (2010).

246. For other examples in monetary and financial law, see CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* (2012).

247. See Gabriel Goodliffe & Stéphan Sberro, *The G20 after Los Cabos: Illusions of Global Economic Governance*, 47 INT'L SPECTATOR 1 (2012).

## 2. Substantive Implications for Rule Making, Interpretation, and Compliance

While the pressure for international legal processes to migrate from the global level toward particular subsystems is constant across various international legal processes, it has specific implications for rule making, interpretation, and compliance. This section briefly notes some of these implications, including a likely decline in the “legalization” of global rules where they do emerge, a growing potential for interpretative indeterminacy, and the possibility for compliance improvements within subsystems.

The multi-hub structure suggests a decrease in legalization—the precision, obligation, and delegation—of newly created global rules as compared to subsystem level alternatives.<sup>248</sup> Due to the need to accommodate a larger number of states with distinct preferences, rules will often be relatively shallow and narrow, provided that the common interests necessary for the rule can be found.<sup>249</sup> As a result, the global legal rules they consent to will likely be less precise in the nature of the obligations they impose. Similarly, such rules are likely to exhibit less frequent delegation to external enforcement mechanisms, so that states whose preferences may not be directly accommodated might still accept the rule, knowing that it cannot readily be enforced. The aforementioned Copenhagen Accord is a clear example. It is imprecise in that it merely recognizes the need to “hold the increase in global temperature below 2 degrees Celsius,” rather than creating any specific obligations for states to achieve this goal.<sup>250</sup> Furthermore, the Accord creates no enforcement mechanism.<sup>251</sup>

In contrast, within subsystems, the existence of overlapping interests and the ability of the hub to expand substantive agreement increases the possibility for more precise rules and more significant delegation to enforcement mechanisms. For example, the original Kyoto Protocol, which never truly sought nor achieved global participation, is far more specific than the Copenhagen Accord.<sup>252</sup> Similar developments can be seen in the international trade regime, where more recent agreements at the regional level, such as the aforementioned TPP and the RCEP are often more specific than earlier global agreements, including, for example, specific investment protections.

While newly established global rules are likely to exhibit less precision in the multi-hub system, the interpretation of existing rules may fragment, leading to indeterminacy. Interpretation involves the coordination of multi-

248. See Kenneth W. Abbott, et. al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000).

249. See OLSON, *supra* note 225.

250. Copenhagen Accord, *supra* note 3.

251. *Id.*

252. See generally Kyoto Protocol to the United Nations Framework Convention on Climate Change (2008), <http://unfccc.int/resource/docs/convkp/kpeng.pdf>. Fifty-five states have ratified the Kyoto Protocol. Similarly, the proposed EU-led 2015 Protocol thereto will likely be far more specific. See *The 2015 International Agreement*, EUR. COMM’N, CLIMATE ACTION (Oct. 28, 2014), [http://ec.europa.eu/clima/policies/international/negotiations/future/index\\_en.htm](http://ec.europa.eu/clima/policies/international/negotiations/future/index_en.htm).

ple states' understandings of a term's meaning.<sup>253</sup> In the past, the United States, as global hegemon, was engaged in almost all significant interpretative processes and helped ensure a degree of interpretative consistency across the system.<sup>254</sup> In contrast, without a hegemon, many hubs can articulate alternative interpretations that better reflect their respective preferences.<sup>255</sup> Hubs may also be able to attract other states to their preferred interpretation or impose their preferred interpretation on them.<sup>256</sup> Separate interpretations advanced by different hubs, such as the conflicting U.S. and Chinese interpretations of permissible military activities within a foreign state's EEZ, discussed above, result in interpretative fragmentation across subsystems. Where there is no authoritative body or process to reconcile those fragmented interpretations, the prospect of interpretative indeterminacy increases.<sup>257</sup>

Finally, in the multi-hub system there is at least a potential for improved compliance with some legal rules. Rationalist accounts of compliance assume that, when deciding whether or not to comply with a legal rule, states consider the immediate value of compliance or defection as well as the potential costs of sanctions that may follow violation.<sup>258</sup> Asymmetric power

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253. See Abram Chayes & Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOTIATION J. 311, 318 (1991); Chayes & Chayes, *supra* note 232, at 189–90 (“The broader and more general the language, the wider the ambit of permissible interpretations to which it gives rise . . . . [I]t remains open to a state, in the absence of bad faith, to maintain its [interpretive] position and try to convince the others.”).

254. For a discussion of the role of the hegemon in interpretation, see Krisch, *supra* note 7. See also, Pierre Klein, *The Effects of US Predominance on the Elaboration of Treaty Regimes and the Evolution of the Law of Treaties*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 363 (Michael Byers & Georg Nolte eds., 2008).

255. By virtue of their wealth and larger bureaucratic apparatus, more powerful states may have first-mover advantages that allow them to lay down interpretive markers that frame the debate. For an example in judicial interpretation, see *Lewis v. Great Britain (David J. Adams Case)* (U.S. v. Gr. Brit.), 6 R.I.A.A., 85–91 (1921) (demonstrating the ability of the UK to frame the debate even before the arbitral tribunal). The U.S. Senate and Executive routinely lay such interpretative markers. See Michael J. Glennon, *Interpreting Interpretation: The President, the Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U.C. DAVIS L. REV. 913 (1986). In addition, interpretations by powerful states may be better-articulated and supported by legal analysis. On the power of quality legal reasoning, see Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) (arguing that the compliance pull of legitimacy flows from determinacy, pedigree, coherence, and adherence); Lawrence Helfer & Anne-Marie Slaughter, *Toward A Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 318 (1997) (on the “quality of legal reasoning”).

256. See Chayes & Chayes, *supra* note 229, at 191.

257. Most international legal disputes never reach a neutral arbiter of meaning and, as a result, the interpretive process is often a contestation of interpretations outside formal judicial process. See Chayes & Chayes, *supra* note 253, at 318. On indeterminacy, see Prosper Weil, *Toward Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 426–33 (1983).

258. George W. Downs, *Enforcement and the Evolution of Cooperation*, 19 MICH. J. INT'L L. 319, 324 (1998) (“the level of threatened punishment needed to dissuade a State from violating an agreement depends on the benefits that the State would gain from defection”). See also George W. Downs, David M. Rocke, & Peter N. Barsboom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996). Sanctions here are used broadly to include any formal or informal costs that may be imposed on a state which violates a legal rule. See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 492 (2005) (describing the role of “collateral consequences”).

distributions allow more powerful states to impose costs on target states, potentially improving compliance.<sup>259</sup> While the decline of U.S. hegemony makes the United States less able to effectively impose sanctions, new hubs are becoming ever more capable of and willing to do so.

Within subsystems, the threat of newly available potential sanctions imposed by hubs will, on the margin, increase the compliance propensity of non-hubs. Examples of such compliance-inducing enforcement efforts by hubs are becoming more frequent, but are limited to the circumstances in which those hubs have an interest in other states' compliance with the particular rule.<sup>260</sup> For example, in 2005 India cut off all military aid to Nepal after deposed King Gynendra Shah assumed absolute powers through emergency rule.<sup>261</sup> Similarly, at the Human Rights Council in 2013 India demanded "an independent and credible investigation into allegations of human rights violations and loss of civilian lives" in Sri Lanka and suggested that continued impunity would be detrimental to Sri Lanka.<sup>262</sup> Russia has taken an active role in enforcing anti-drug trafficking rules in Central Asia and Afghanistan, including conditional economic development and the imposition of punitive measures on non-cooperating states.<sup>263</sup> It has used the threat of gas pipeline shutoffs to enforce what it deemed to be breaches of international law by Ukraine.<sup>264</sup> After the coup in Honduras in 2009, Brazil

259. See Downs, Rocke, & Barsoom, *supra* note 258; William H. Kaempfer & Anton D. Lowenberg, *The Theory of International Economic Sanctions: A Public Choice Approach*, 78 AM. EC. REV. 786, 786 (1988) ("It is generally pointed out that sanctions are costly to the sanctioning country as well as the target."); Lisa L. Martin, *Credibility, Costs and Institutions: Cooperation on Economic Sanctions*, 45 WORLD POL. 406 (1993). For an example, see generally ROBERT L. FREIDHEIM, *TOWARD A SUSTAINABLE WHALING REGIME* (2001) (demonstrating U.S. use of trade sanctions to alter other states' whaling behavior).

260. Some hubs with particularly strong views of sovereignty may be unlikely to impose direct sanctions, yet, they may still generate "collateral consequences." See Hathaway, *supra* note 258, at 492.

261. See *Military Aid to Nepal Ended on February 1: India*, TIMES OF INDIA, Feb. 22, 2005, available at [http://articles.timesofindia.indiatimes.com/2005-02-22/rest-of-world/27846146\\_1\\_military-aid-ramesh-nath-pandey-indian-ambassador](http://articles.timesofindia.indiatimes.com/2005-02-22/rest-of-world/27846146_1_military-aid-ramesh-nath-pandey-indian-ambassador).

262. Meenkashi Ganguly, *Can India Be a Human Rights Leader?*, GLOBAL RTS., June 21, 2013, <https://www.opendemocracy.net/openglobalrights/meenkashi-ganguly/can-india-be-international-human-rights-leader>.

263. See Ivan Nechepurenko, *Russia Fights Addiction to Afghan Heroin*, MOSCOW TIMES, May 27, 2013, available at <http://www.themoscowtimes.com/news/article/russia-fights-addiction-to-afghan-heroin/480593.html>; Yelena Chernenko, *Если мы не приходим в Центральную Азию, она придет к нам* [If We Don't Go Into Central Asia, It Will Come to Us], KOMMERS. APR. 29, 2013, available at <http://kommersant.ru/doc/2181531> (interviewing a senior Russian official on a developmental program to combat proliferation of narcotics/narcotics shipments in Central Asia). See also Соглашение между Правительством Российской Федерации и Правительством Республики Таджикистан о сотрудничестве в борьбе с незаконным оборотом наркотических средств, психотропных веществ и со злоупотреблением ими [Agreement between the Russian Federation and the Republic of Tajikistan on Cooperation in Combating Illicit Trafficking of Narcotic Drugs and Psychotropic Substances and Their Abuse] Russ.-Taj., Dec. 3, 2009, [http://webcache.googleusercontent.com/search?q=cache:g6olYGajWoJ:www.mid.ru/BDOMP/spd\\_md.nsf/0/8835C1C9A943909144257D51004290BE+&cd=1&hl=en&ct=clnk&gl=us](http://webcache.googleusercontent.com/search?q=cache:g6olYGajWoJ:www.mid.ru/BDOMP/spd_md.nsf/0/8835C1C9A943909144257D51004290BE+&cd=1&hl=en&ct=clnk&gl=us); Russia-Tajikistan Bilateral Agreement on Combating Illegal Narcotics Trade and Use, 3 Dec. 2009.

264. See, e.g., "РФ может применить санкции к Украине при пересмотре газового контракта" [Russian Federation May Adopt Sanctions against Ukraine in Case of a Revision of the Gas Contract], RIA NOVOSTI (Oct. 10, 2013), <http://ria.ru/economy/20131010/969155152.html> (containing a statement by

sheltered ousted Honduran President, Manuel Zelaya, in what it termed an effort to restore democracy and sought to prevent Honduras' return to the Organization of American States until the goal was achieved.<sup>265</sup> Similarly, Russia, India, and China have all become far more active in the enforcement of international counter-terrorism rules.<sup>266</sup> Ultimately, such efforts may promote compliance, but only where hubs have a preference for rule enforcement.

A second rationalist account of compliance is based on the value of reputation and also suggests possible compliance improvements within subsystems. Reputations are valuable because they facilitate credible commitments to other states.<sup>267</sup> The ability of hubs to attract followers will, in part, turn on the credibility of their commitments.<sup>268</sup> In a system where attraction plays an enhanced role, so too should reputation, possibly resulting in compliance improvements by hubs that seek to attract followers through a positive reputation for compliance. China, for example, has recently sought to improve its reputation, precisely to avoid repelling frightened neighbors, such as Vietnam and Myanmar.<sup>269</sup> Given that reputations are often issue-specific, this effect will be limited to issue areas in which hubs seek to make credible commitments.<sup>270</sup> Again, the net impact on compliance will depend on hubs' particular interests.

As it evolves, the multi-hub structure will have a range of specific implications for various international legal processes beyond those sketched here. As a general matter, the multi-hub structure will increase pluralism in the international legal system and generate pressures for many international legal processes to migrate toward separate, flexible subsystems. While interpretations of international law will diversify and may fragment, compliance

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the Press-Secretary of Russia's Prime Minister stating that Ukraine's actions will lead to legal consequences), <http://www.kommersant.ru/news/2316542/rubric/3>.

265. See Jens Glüsing, *South America's Gentle Giant: Brazil Flexes Muscles over Honduras Crisis*, SPIEGEL (Oct. 9, 2009), <http://www.spiegel.de/international/world/south-america-s-gentle-giant-brazil-flexes-muscles-over-honduras-crisis-a-653753.html> (emphasizing that Brazil saw its role in the Honduras crisis as reflective of "a new political order"); *Hillary Clinton Urges the OAS to Readmit Honduras*, BBC NEWS (June 7, 2010), <http://www.bbc.co.uk/news/10256459>. Honduras was eventually readmitted to the OAS with Brazilian support in June 2011.

266. For a U.N. report covering the efforts of a number of hubs, see U.N. Comm. on Crime Prevention and Criminal Justice, Assistance in Implementing the International Conventions and Protocols Related to Terrorism, U.N. Doc. E/CN.15/2009/5 (Jan. 16, 2009). See also GLOBAL ANTI-TERRORISM LAW AND POLICY (Victor V. Ramra et al. eds., 2012).

267. See Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 235 (2009) (defining reputation as "a belief about the state's future actions based on its past actions").

268. See ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 35 (2006) (assuming "that states . . . are concerned with maintaining good standing . . . to the extent that changing one's . . . reputation affects payoffs"); Hathaway, *supra* note 258, at 500–07.

269. See generally JOSHUA KURLANTZICK, *CHARM OFFENSIVE: HOW CHINA'S SOFT POWER IS TRANSFORMING THE WORLD* (2007).

270. Because reputations are issue-specific, strategic hubs may engage in reputation management, by cultivating positive reputations on issues for which they value credibility, but violating rules in other areas without reputational cross-contamination. See George Downs & Michael Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95, 113 (2002).

may actually increase within subsystems. The next Part turns from structure to substance, illustrating growing pluralism where rising powers are articulating and advancing distinct preferences within the international legal system.

#### IV. THE PREFERENCES OF RISING POWERS: PLURALISM, EMERGING TENSIONS, AND THE RETURN OF THE STATE

This Part moves from structure to substance. It examines the preferences several new hubs, notably Brazil, Russia, India and China, are articulating in the international legal system to show that the pluralism anticipated in the structural analysis above is, in fact, emerging. This new pluralism is evident at three key tension points: (1) understandings of sovereignty, (2) approaches to legitimacy, and (3) the role of the state in economic development. Based on their respective preferences, rising powers are not challenging or rejecting international law as such. Instead, at each of these three tension points, one or more rising powers is becoming a new hub within the system, articulating distinct preferences that are, to varying degrees, in tension with those embedded into international law during the trans-Atlantic moment. As rising powers are advancing these preferences within the international legal system some non-hubs are choosing to follow.

While the power shifts that informed the structural analysis in Parts II and III relate to the potential of states to influence the international legal system, it is the preferences of these states, not their power, that determine the direction and intensity of their newfound influence. Preferences govern the willingness of states to expend power and the purposes to which that power will be applied.<sup>271</sup> To conduct a country and issue-specific preference analysis thoroughly requires detailed examination of individual country preferences across multiple issue areas<sup>272</sup> and a country-specific account of preference change over time.<sup>273</sup> Such an analysis is beyond the scope of an article-length treatment. Instead, this Part focuses on the ways rising powers are articulating underlying preferences in legal terms through the processes of international law. The argument here does not turn on the underlying origins of state preferences, which may include domestic interests, govern-

271. See *supra* text accompanying notes 36–47.

272. See Moravcsik *supra* note 17, at 516–19. Rising powers cannot be treated as a block due to their distinct, at times contradictory, interests and unique domestic challenges. For a discussion of their differences, despite desires for cooperation, see Christian Brutsch & Mihaela Papa, *Deconstructing the BRICS: Bargaining Coalition, Imagined Community, or Geopolitical Fad?*, 6 CHINESE J. INT'L POL. 299 (2013); Michael Emerson, *Do the BRICS Make a Bloc?*, CEPS COMMENTARY, Apr. 30, 2012; Michael Glosny, *China and the BRICS: A Real (but Limited) Partnership in a Unipolar World*, 42 POLITY 100 (2010).

273. For a discussion of “the difficulty of divining future intentions” of a rising power, see Jeffrey W. Legro, *What China Will Want: The Future Intentions of a Rising Power*, 5 PERSPECTIVES ON POL. 515 (2007). Constructivist international relations scholars might frame these interests instead as state “identities.” See Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 2001 ANNUAL REV. POLIT. SCI. 391, 396 (2001).



mental structures, or even the distribution of power itself.<sup>274</sup> Rather, this paper uses the translation of preferences into international legal discourse as a proxy for underlying preferences. For example, the argument is not that Russia or China has a preference for sovereignty as such, but rather, that Russia and China are articulating underlying preferences through a particular legal rhetoric of sovereignty that is in tension with aspects of sovereignty as advanced by some traditional powers.

Collectively, the preferences being expressed by some rising powers at these tension points suggest a far more state-centric version of international law that is, at times, incompatible with the expanding role of the individual and the Lockean international legal norms championed largely by the United States and Europe during the past half century.<sup>275</sup> The ultimate evolution of international law at these tension points remains to be seen, but it is likely to involve a reassertion of the state and, quite likely, both a fragmentation among distinct subsystems and a new global equilibrium closer to the Westphalian origins of international law. However this evolution proceeds, rising powers' articulation of their preferences is increasing pluralism and putting new emphasis on subsystemic legal processes.

#### A. *Sovereignty: Absolute or Permeable*

Sovereignty is a *grundnorm* of international law, albeit one with a number of distinct meanings.<sup>276</sup> As used here, sovereignty refers to international legal sovereignty or the authority of the state to control and exclude others from its territory. The question of when sovereignty does or should give way to other legal rules or values remains debated. Over the past sixty-five years sovereignty in international law has become more permeable. This trend has been gradual and taken many forms, ranging from a greater willingness of the U.N. Security Council to determine that events within a state's borders constitute threats to international peace and security,<sup>277</sup> the creation of international human rights tribunals,<sup>278</sup> the establishment of the ICC,<sup>279</sup> and the development of a legal framework for investor-state arbitration.<sup>280</sup> This

274. On different sources of preferences, see Moravcsik, *supra* note 17.

275. For a view of sovereignty in which individual rights trump those of states, see Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2034 (2003) ("[T]he international community has become a party to the social contract between citizens and their government.").

276. See U.N. Charter art. 2, para. 4, 7. For a discussion of the various meanings of sovereignty, see KRASNER, *supra* note 35.

277. See, e.g., Jared Genser & Bruno Ugarte, *Evolution of the Security Council's Engagement on Human Rights*, in THE UN SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS (Jared Genser & Bruno Ugarte eds., 2013).

278. On invocations of Chapter VII by the Council, see Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 790 (2006).

279. For the text, see Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, available at [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

280. See William Burke-White and Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 288–90 (2009).

move towards more permeable sovereignty is perhaps most dramatically illustrated by the efforts of some western states, notably Canada and the UK, to promote a version of sovereignty that gives way where liberal conceptions of individual rights are in jeopardy.<sup>281</sup> Under the auspices of the Canadian government, Gareth Evans, a former Australian Foreign Minister, drafted the Report of the International Commission on Intervention and State Sovereignty ("ICISS"), which concluded: "[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."<sup>282</sup>

The United States has been, at times, supportive and, at other times, ambivalent to these changes. It has often supported greater permeability of sovereignty when authorized by the U.N. Security Council and has advocated a somewhat hypocritical position of absolute sovereignty for itself, but more permeable sovereignty for other states.<sup>283</sup> Permeable sovereignty abroad implies that individual states, groups of states, or international organizations may have a legal right to intervene in the domestic affairs of other states when certain conditions are met, even without Security Council authorization.<sup>284</sup> Examples of U.S. application of this more permeable sovereignty include the 1999 NATO air strikes in Serbia in response to the commission of crimes against humanity by Slobodan Milosevic and the 2003 invasion of Iraq in response to Saddam Hussein's suspected development of weapons of mass destruction.<sup>285</sup> In the 2010 National Security Strategy, the

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281. See Prime Minister Tony Blair, Address to the Chicago Economic Club, Apr. 22, 1999, available at [http://www.pbs.org/newshour/bb/international-jan-june99-blair\\_doctrine4-23/](http://www.pbs.org/newshour/bb/international-jan-june99-blair_doctrine4-23/) (laying out permissible criteria for international intervention). For similar approaches, see Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST 49 (Sept. 18, 1999) ("State sovereignty, in its most basic sense, is being redefined . . . States are now widely understood to be instruments at the service of their peoples, and not vice versa."); Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 40 (1995).

282. INT'L COMM. ON INTERVENTION & STATE SOVEREIGNTY, REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY: THE RESPONSIBILITY TO PROTECT 2 (2001).

283. See STEPHEN BROOKS, AMERICAN EXCEPTIONALISM IN THE AGE OF OBAMA 98 (2012) ("[T]here is little doubt that national sovereignty has more and fiercer defenders in the United States."); G. John Ikenberry, *Illusions of Empire: Defining the New American Order*, 83 FOREIGN AFFAIRS 144, 145–46 (2004) (highlighting the "unbundling" of the traditional "Westphalian" international norm of state sovereignty by the U.S. invocation of "contingent sovereignty" and its claimed right to intervene abroad); cf. KRASNER, *supra* note 35 (attributing "hypocrisy" to the observance of sovereignty in international relations generally). For a suggestion that this exceptionalism reaches well beyond the United States, see Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L. J. 1 (2011).

284. See Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, 79 FOREIGN AFF. 9 (2000) (noting the "growing" movement that "has developed a coherent blueprint for defending American institutions against the alleged encroachment of international ones" while allowing "the United States [to] pick and choose the international conventions and laws that serve its purpose and reject those that do not.").

285. On Kosovo, see Bill Clinton, Statement on Kosovo, Mar. 24, 1999, available at <http://millicenter.org/president/speeches/detail/3932>. On Iraq, see George W. Bush, Address on the Start of War, (Mar. 19, 2003), available at <http://www.theguardian.com/world/2003/mar/20/iraq.georgebush>.

Obama administration appeared to embrace the position that the international community might have a right of intervention, even absent Security Council authorization, where a national government failed to protect its own people: “responsibility passes to the broader international community when sovereign governments themselves commit genocide or mass atrocities . . . . In the event that prevention fails, the United States will work both multilaterally and bilaterally to mobilize diplomatic, humanitarian, financial, and—in certain instances—military means to prevent and respond to genocide and mass atrocities.”<sup>286</sup>

Notwithstanding an at times inconsistent U.S. position, voices in the trans-Atlantic coalition have advocated more expansive exceptions to state sovereignty.<sup>287</sup> In response thereto, rising powers, particularly Russia and China, are articulating a different preference for a more absolutist sovereignty. As they have done so, they are establishing themselves as alternative hubs on this issue, attracting followers, generating new pluralism, and, perhaps, shifting the rules of international law back toward a more classic, Westphalian version of sovereignty.

### 1. *Russia and China's Preferences for Absolutist Sovereignty*

Sovereignty (суверенитет), framed in absolute terms, is at the heart of Russia's foreign policy.<sup>288</sup> The 2000 Foreign Policy Concept of the Russian Federation—Russia's equivalent to the U.S. National Security Strategy—articulates the centrality of sovereignty to Russian foreign policy: “Attempts to belittle the role of a sovereign state as the fundamental element of international relations generate a threat of arbitrary interference in internal affairs.”<sup>289</sup> Among the “priorities of the Russian Federation” are “enhancing the efficiency of political, legal, foreign economic, and other instruments for protecting the state sovereignty of Russia.”<sup>290</sup> The Concept Paper makes clear that “[a]ttempts to introduce into the international parlance such concepts as ‘humanitarian intervention’ and ‘limited sovereignty’ in order to justify unilateral power actions bypassing the U.N. Security Council are not acceptable.”<sup>291</sup> Russia's updated 2013 Concept Paper puts forward an even

286. President Barack Obama, NATIONAL SECURITY 48 (2010), [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

287. See Address of Prime Minister Blair, *supra* note 281.

288. For a discussion of Russian views on sovereignty, see generally Mikhail Antonov, *Theoretical Issues of Sovereignty in Russia and Russian Law*, 37 REV. CENT. & E. EUR. L. 95–113 (2012); Gordon B. Smith, *Russian Exceptionalism? Putin's Assertion of Sovereignty at Home and Abroad*, Conference paper presented at Sovereignty and the New Executive Authority Conference, University of Pennsylvania Law School (Apr. 20, 2013), available at <https://www.law.upenn.edu/live/files/1882-gordon-smith-russian-exceptionalism.pdf>.

289. Концепция Внешней Политики Российской Федерации [Foreign Policy Concept of the Russian Federation, 2000], Jun. 28, 2000, <http://www.mid.ru/bdomp/ns-osndoc.nsf/4e5fa867101effb4432569fa003a705a/d2658119bbb357ecc325748800375061!OpenDocument>.

290. *Id.*

291. *Id.*

more absolute version, referring to the importance of sovereignty thirteen times and positing one of Russia's most basic foreign policy goals as "protecting and strengthening its sovereignty."<sup>292</sup> The contrast between this approach to sovereignty and that contained in the 2010 U.S. National Security Strategy, quoted above, is striking.<sup>293</sup>

The Russian conception of sovereignty is not only strongly held, but also far more absolute than that advanced by many states over the past twenty years. Russia's "sovereignty is rooted in cultural traditions that emphasize statism, collectivism, [and] strong leadership."<sup>294</sup> For Russia, the sovereign state is Weberian and Hobbesian, not Lockean: "[C]itizens obtain freedom, justice, and security from the state's exercise of control and power, rather than the state and its leaders deriving authority from its citizens."<sup>295</sup> Due to the unique Soviet legacy, "sovereignty was perceived . . . as the authorities' mechanism of control over the population."<sup>296</sup> Russian President Putin explains: "Russia will decide itself how it can implement the principles of freedom and democracy, taking into account its historical, geopolitical and other specificities. As a sovereign state, Russia can and will independently establish for itself the timeframe and conditions for moving along this path."<sup>297</sup> The Russian Constitutional Court has upheld this absolutist vision of national sovereignty in decisions limiting assertions of sovereignty by regional entities within the Russian Federation.<sup>298</sup>

Perhaps due to the legacy of the USSR, Russia has a preference for a version of sovereignty that can legitimate intervention within its perceived sphere of influence. For example, Russia claims a duty to protect citizens abroad, particularly in the post-Soviet space.<sup>299</sup> Russia has also sought to expand its extraterritorial rights in what then-President Medvedev referred

292. Концепция Внешней Политики Российской Федерации [Foreign Policy Concept of the Russian Federation, 2013], Feb. 12, 2013, <http://www.mid.ru/bdomp/ns-osndoc.nsf/e2f289bea62097f9c325787a0034c255/c32577ca0017434944257b160051bf7f?OpenDocument>. Article 15 of the 2013 Concept Paper decries efforts aimed at "overthrowing legitimate authorities in sovereign states under the pretext of protecting civilian population." *Id.*

293. See NATIONAL SECURITY STRATEGY, *supra* note 286, at 48.

294. Smith, *supra* note 288, at 5.

295. *Id.* at 6; Mikhail Marchenko, *Государственный Суверенитет: Проблемы Определения Понятия и Содержания* [State Sovereignty: Problems of Identifying Understanding and Content], 1 ПРАВОВЕДЕНИЕ [PRAV.] 186, 190–96 (2003).

296. Antonov, *supra* note 288, at 100. But *cf.* Постановление Конституционного Суда РСФСР от 13 марта 1992 г. [Ruling of the Constitutional Court of RSFSR of Mar. 13, 1992], *По Делу о Проверке Конституционности Декларации о Государственном Суверенитете Республики Татарстан* [On the Verification of the Constitutionality of the Declaration of State Sovereignty by the Republic of Tatarstan], <http://russia.bestpravo.ru/fed1992/data03/tex14580.htm> (analyzing the nature and implications of sovereignty in the Russian federal system).

297. Vladimir Ryzhkov, *Sovereignty vs. Democracy?*, 3 RUSS. IN GLOBAL AFF. 101, 102 (2005).

298. See Antonov, *supra* note 288, at 103–05.

299. See государственной политике Российской Федерации в отношении соотечественников за рубежом [Federal Law of the Russian Federation on the State Policy in Regard to the Fellow Citizens Residing Abroad], СОБРАНИЕ ЗАКОНОДАТЕЛ'СТВА РОССИЙСКОЙ ФЕДЕРАЦИИ [SZ RF] [Russian Federation Collection of Legislation] 1999, No. 22, Item 2670 (providing that "if a foreign state violates recognized

to as a “privileged interests”<sup>300</sup> established by regional agreements that authorize Russian influence or intervention.<sup>301</sup> For Russia, sovereignty is the international legal articulation of underlying preferences for freedom of action within its own territory and its expanding regional influence.

China also articulates a relatively absolutist version of sovereignty (*zhuguan*) that generally trumps competing values. China’s approach to sovereignty likely has roots in underlying domestic and international interests, including the preservation of the regime,<sup>302</sup> the need for “political security,”<sup>303</sup> and threats to territorial integrity,<sup>304</sup> all framed by a history of foreign interference.<sup>305</sup> As Wang Jisi explains: “[a] unique feature of Chinese leaders’ understanding of their country’s history is their persistent sensitivity to domestic disorder caused by foreign threats.”<sup>306</sup> While there is a growing spectrum of discourse in Chinese foreign policy debate, sovereignty dominates. Chinese realists “uphold the principle of state sovereignty above all else, rejecting arguments that transnational issues penetrate across borders.”<sup>307</sup> Even more liberal thinkers, such as Yan Xuetong, recognize China is just beginning to move beyond being “a self-absorbed power obsessed with sovereignty.”<sup>308</sup> While some Chinese policy-makers recognize the need to engage internationally, they seek to do so on terms that affirm China’s sovereignty.<sup>309</sup>

The Chinese articulation of sovereignty can be traced back to the 1954 “Five Principles of Peaceful Coexistence,”<sup>310</sup> which embody core elements of

norms of international law and human rights in regard to Russian expatriates, the Russian Federation shall undertake efforts authorized by international law to defend their interests”).

300. Interview by Television Channel One, Russia, NTV with Dmitri Medvedev, President, Russian Federation, in Sochi, Russia (Aug. 31, 2008), available at [http://archive.kremlin.ru/eng/speeches/2008/08/31/1850\\_type82912type82916\\_206003.shtml](http://archive.kremlin.ru/eng/speeches/2008/08/31/1850_type82912type82916_206003.shtml).

301. These include the Commonwealth of Independent States, The Collective Security Treaty Organization, and the Eurasian Economic Community, which give Russia extraterritorial authority.

302. See SHAMBAUGH, *supra* note 76, at 56–57 (the goal of keeping the regime in power leads to a defensive nationalism that is about maintaining face and sovereignty).

303. *Id.* at 59–60. For discussion of work by Chinese scholars prioritizing sovereignty, see Chengqui Wu, *Sovereignty, Human Rights, and Responsibility: Changes in China’s Response to International Humanitarian Crises*, 15 J. CHINESE POL. SCI. 71, 78 (2010).

304. See Xia Liping, *Asian Security: China’s Perspective*, in CRUX OF ASIA: CHINA, INDIA, AND THE EMERGING GLOBAL ORDER 105, 107 (Ashley Tellis & Sean Mirski, eds., 2013).

305. Historical threats lead to an unusually strong interest in “maintaining territorial integrity” and preserving “cultural integrity.” SHAMBAUGH, *supra* note 76, at 53–54. For an historical perspective see generally Suzanne Ogden, *Sovereignty and International Law: The Perspective of the People’s Republic of China*, 7 N.Y.U. INT’L J. L. & POL. 1 (1974).

306. Wang Jisi, *China’s Search for a Grand Strategy: A Rising Power Finds its Way*, 90 FOREIGN AFF. 68, 69 (2011).

307. SHAMBAUGH, *supra* note 76 at 32. Only for a relatively small portion of the Chinese elite—the so called “globalists”—does sovereignty not have pride of place. *Id.* at 41–42.

308. Yan Xuetong, *How Assertive Should a Great Power Be?* N.Y. TIMES, Mar. 31, 2011, <http://www.nytimes.com/2011/04/01/opinion/01iht-edyan01.html>.

309. See SHAMBAUGH, *supra* note 76, at 34–36.

310. China Ministry of Foreign Aff., CHINA’S INITIATION OF THE FIVE PRINCIPLES OF PEACEFUL COEXISTENCE (2000), <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18053.htm>. For discussion, see Chang-fa Lo, *Values to Be Added to an ‘Eastphalia Order’ by the Emerging China*, 17 IND. J. GLOBAL LEGAL

the modern, absolutist conception: “mutual respect for territorial integrity and sovereignty, mutual nonaggression, mutual non-interference in internal affairs, equality and mutual benefit, [and] peaceful coexistence.”<sup>311</sup> In a 2008 speech China’s then President Hu Jintao observed: “We should always put the nation’s sovereignty and security above anything else.”<sup>312</sup> This approach has informed China’s modern engagement with international law.<sup>313</sup>

Like Russia, China’s emphasis on an absolutist approach to sovereignty challenges the more permeable trans-Atlantic vision.<sup>314</sup> As a leading Taiwanese observer comments: “Chinese reemphasis on the Five Principles . . . will challenge Western-led interventionist practices and principles in . . . international law.”<sup>315</sup> There is, however, recent evidence that China’s approach to sovereignty is becoming more pragmatic, recognizing competing considerations.<sup>316</sup> For example, China abstained in the Security Council votes on resolutions referring the situations in Sudan and Libya to the ICC and authorizing the use of force in Libya. As Yan Xuetong notes: “China’s policy on Libya is clearly a break” and there is “increased recognition of the fact that China must exercise positive influence on international affairs.”<sup>317</sup>

## 2. *Sovereignty as Tension Point: The Responsibility to Protect*

Russia and China are articulating their more absolutist versions of sovereignty in the international legal system and, in the process, are becoming hubs on this issue. They are offering a credible alternative to the growing permeability of sovereignty championed by some Western states and are attracting followers. The tension over sovereignty is perhaps most evident in

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STUD. 13, 17–18 (2010). For their continued relevance till the modern era, see also Wen Jiabao, Premier, State Council China, Address Commemorating the 50th Anniversary of the Five Principles of Peaceful Coexistence (Jun. 28, 2004).

311. Chang-fa Lo, *supra* note 310, at 17.

312. Hu Jintao, General Secretary of the CPC Central Committee, Speech at the Meeting Marking the 30th Anniversary of Reform and Opening Up (Dec. 18, 2008), [http://www.china.org.cn/archive/2009-05/11/content\\_17753659.htm](http://www.china.org.cn/archive/2009-05/11/content_17753659.htm). See also Dai Bingguo, Chinese State Councilor, Closing Remarks at the U.S.-China Strategic and Economic Dialogue (Jul. 28, 2009) (on the need to uphold sovereignty and territorial integrity), <http://www.state.gov/secretary/rm/2009a/july/126599.htm>.

313. See Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, 221 RECUIEL DES COURS 195, 288 (1990) (“Strict adherence to the principle of the inviolability of sovereignty has become a distinctive feature of . . . the People’s Republic of China.”).

314. One discourse analysis found that between 1990 and 2009, the China Foreign Ministry spokesperson answered questions on human rights 125 times, of which 87 referenced the protection of sovereignty. See Wu, *supra* note 303, at 84.

315. Chang-fa Lo, *supra* note 310, at 19.

316. The early edges of this softening were evident in a 2005 article by Wang Yizhou: “[M]ore and more phenomena prove that non-interference (*buganshe*) has preconditions (*you qianide*).” Wang Yizhou, *Guoji Guanxi Yanjiu Ruogan Wenti* [“Several issues in the study of international relations”], 3 OUZHOU YANJIU [European Research] 131 (2006), cited in Allen Carlson, *Moving Beyond Sovereignty? A Brief Consideration of Recent Changes in China’s Approach to International Order and the Emergence of the tianxia Concept*, 20 J. CONTEMP. CHINA 89, 94 (2011). For an argument on Chinese pragmatism see Jonathan E. Davis, *From Ideology to Pragmatism: China’s Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT’L L. 217, 217 (2011).

317. See Yan Xuetong, *supra* note 308.

the recent evolution of the Responsibility to Protect ("R2P"), an asserted norm and, in the view of some, emerging rule of customary international law that generates secondary obligations on the international community to act where national governments fail in their primary obligations to prevent genocide, crimes against humanity, and war crimes.<sup>318</sup>

Despite their strong preferences for an absolutist version of sovereignty, China and Russia both participated in 2005 World Summit, which led to the codification of R2P in the World Summit Outcome Document that was, subsequently, adopted by the General Assembly.<sup>319</sup> Perhaps they assumed that the reference to R2P was merely rhetorical, posing no new challenge to their versions of sovereignty. After all, the Outcome Document merely reaffirmed the responsibility of the territorial state to prevent serious crimes and limited any possible right of international intervention to be "on a case-by-case basis" and "in accordance with the Charter, including Chapter VII."<sup>320</sup> Yet, as the development of R2P gained momentum and some states, scholars, and NGOs began to suggest R2P might provide independent grounds for the use of force without Security Council approval or that there might be an obligation for Security Council members to authorize such action, Russia and China's versions of sovereignty came under threat.<sup>321</sup> Since then, they have sought to limit the scope, legal status, and applicability of R2P.<sup>322</sup> Specifically, in the debates leading up to the first reference to R2P in a Security Council resolution in 2006, China and Russia argued persuasively for the Council to merely "acknowledge," rather than formally "adopt," the relevant language of the World Summit Outcome Document.<sup>323</sup>

The Libya crisis of 2011 arose at a time when all four BRICs were on the Security Council (India and Brazil as non-permanent members). While all abstained in the vote on Resolution 1973, thereby tacitly allowing action in Libya,<sup>324</sup> their behind-the-scenes diplomatic efforts ensured that the resolution did not mention the "Responsibility to Protect" as such, did not refer

318. For the origins of the norm, see INT'L COMM., *supra* note 285, at 11–18; William Burke-White, *Adoption of the Responsibility to Protect*, in THE RESPONSIBILITY TO PROTECT 17, 17–36 (Jared Genser & Irwin Cotler, eds., 2011).

319. See GA Res. 60/1, U.N. GAOR, 60th Sess., U.N. DocA/60/L.1 (Oct. 24, 2005). For discussions of the role played by rising powers in the World Summit, see Alex Bellamy, *Realizing the Responsibility to Protect*, 10 INTERNATIONAL STUDIES PERSPECTIVES 111 (2009).

320. See G.A. Res. 60/1, *supra* note 319 at para. 139.

321. On the suggestion that the Council has a duty to authorize Chapter VII action when peaceful efforts have failed, see generally Anne Peters, *The Security Council's Responsibility to Protect*, 8 INT'L ORG. L. REV. 1, 20 (2011). For an example of inter-governmental organization advocacy, see the work of the Global Center for the Responsibility to Protect that, while recognizing the authority of the Council, calls for more robust Council action. See *About R2P*, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, [http://www.globalr2p.org/about\\_r2p](http://www.globalr2p.org/about_r2p).

322. See Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS IN INT'L AFF. 143, 145 (2010); SCOR, UPDATE REPORT NO. 1: PROTECTION OF CIVILIANS IN ARMED CONFLICT (Mar. 8, 2006), available at <http://www.securitycouncilreport.org/update-report/lookup-c-glKWLeMTISG-b-2821453.php>.

323. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

324. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

back to Resolution 1674 that previously “acknowledged” R2P, and limited operative paragraph 4 to the use of “all necessary measures . . . to protect civilians and civilian populated areas under threat of attack.”<sup>325</sup> At most, Russia and China assumed they were authorizing a narrow intervention approved by the Security Council rather than establishing a more expansive precedent for R2P. While China and Russia could have vetoed the Libya resolution, doing so might have been counterproductive to their efforts to limit R2P, particularly if they believed the United States, France, and U.K. might act even without Security Council authorization, which would have thereby established a much broader precedent for R2P without Council approval.<sup>326</sup> Moreover, both Russia and China laid down clear markers that Resolution 1973 should not be read as having precedential value for future invocations of R2P.<sup>327</sup>

Russia and China deemed U.S. and European efforts at regime change in Libya to exceed the mandate of Resolution 1973.<sup>328</sup> In the wake of Gaddafi’s fall, both Russia and China have become vocal hubs, articulating their alternative preferences on sovereignty and advancing them in the international legal system. As Russia’s 2013 Foreign Policy Concept Paper notes: “It is unacceptable that military interventions and other forms of interference . . . which undermine the foundations of international law based on the principle of sovereign equality of states, be carried out on the pretext of . . . responsibility to protect.”<sup>329</sup> The official Chinese interpretation suggests that R2P merely makes “massive humanitarian crisis[es] . . . a legitimate concern of the international community,” but that international action is limited to efforts “to ease and defuse the crisis.”<sup>330</sup> To avoid any possible interpretation that Security Council action on Syria might provide grounds for intervention, Russia and China have affirmatively vetoed any resolution that references R2P or authorizes the use of force in Syria.<sup>331</sup> And they have sought to preserve the Security Council as the sole source of authority for such interventions. As Putin wrote in the *New York Times*: “Under current interna-

325. See *id.* ¶ 4. On efforts to constrain the doctrine, see Oliver Stuenkel, *Brazil as Norm Entrepreneur: The Responsibility While Protecting*, POST-WESTERN WORLD, Mar. 4, 2013, <http://www.postwesternworld.com/2013/03/04/brazil-as-a-norm-entrepreneur-the-responsibility-while-protecting/>.

326. This assumes that the United States and Europe would have acted even without Security Council authorization, which by March 17th, when Resolution 1973 was adopted, seemed at least plausible. See *Clock is Ticking on Libya, Cameron Warns*, THE TIMES (London), Mar. 15, 2011.

327. For such markers, see SCOR, U.N. Doc. S/PV.6498 (Mar. 17, 2011) (Chinese and Russian Ambassadors’ speeches), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.6498/](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6498/).

328. For statements by China and Russia suggesting that NATO action exceeded authorities under Resolution 1973, see Ben Smith and Arabella Thorp, *Interpretation of Security Council Resolution 1973 on Libya*, INT’L AFF. AND DEF. SEC. OF THE U.K. FOREIGN AFF. AND COMMONW. OFF., (2011), <http://www.parliament.uk/briefing-papers/sn05916.pdf> (quoting Chinese and Russian official condemnations).

329. Концепция Внешней Политики Российской Федерации (2013), *supra* note 292.

330. China Ministry of Foreign Aff., POSITION PAPER OF THE PEOPLE’S REPUBLIC OF CHINA ON THE UNITED NATIONS REFORMS (June 7, 2005).

331. See Rick Gladstone, *Friction at the UN as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, July 19, 2012.



tional law, force is permitted only in self-defense or by the decision of the Security Council.”<sup>332</sup>

As Russia and China have become hubs for a more absolutist version of sovereignty, even if still subordinate to the Security Council, they have attracted followers. Brazil has joined Russia and China, offering a restrictive interpretation of R2P in a concept note entitled “Responsibility while protecting,” that echoes Russia and China in emphasizing the importance of sovereignty and the centrality of both Security Council approval and continuing oversight of any authorized action.<sup>333</sup> Like China and Russia, Brazil too has preferences for a stronger version of sovereignty, based in part on its colonial history and more recent efforts by President Lula to reengage with the world in a way that “affirms Brazil’s sovereignty.”<sup>334</sup> India too has joined this subsystem, with Indian government officials expressing concerns that “an expansive version of R2P is inconsistent with sovereignty and the Charter.”<sup>335</sup> Again, India likely finds Russia and China’s preferences for sovereignty attractive. A leading Indian foreign policy observer notes: “India is deeply committed to state sovereignty as the most important principle in international relations.”<sup>336</sup> While South Africa initially voted in favor of Resolution 1973, it has subsequently expressed serious concerns about how the resolution was implemented in Libya and has moved toward the Russian and Chinese positions. It issued a formal clarification that articulates a far narrower view of R2P, and has championed this view in multilateral fora.<sup>337</sup> As hubs in the system, Russia and China have, in Michael Ignatieff’s words “put down a marker. This is not your world, they want us to know. . . . You will have to reckon with us.”<sup>338</sup>

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332. See Vladimir Putin, Op-Ed., *A Plea for Caution from Russia*, N.Y. TIMES (Sept. 11, 2013), available at <http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html>.

333. See Permanent Rep. of Brazil to the U.N., Letter dated Nov. 9, 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011). Brazil has effectively infused this interpretation into global debate. See Thomas Wright, *Brazil Hosts Workshop on “Responsibility While Protecting,”* FOREIGN POL’Y (Aug. 29, 2012, 11:29 AM), [http://bosco.foreignpolicy.com/posts/2012/08/29/brazil\\_backs\\_responsibility\\_while\\_protecting](http://bosco.foreignpolicy.com/posts/2012/08/29/brazil_backs_responsibility_while_protecting).

334. Hurrell, *infra* note 357 (on Lula’s efforts to secure Brazil’s “sovereign presence”). This approach is consistent with Chayes & Chayes’ vision of sovereignty as inclusion. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 68 (1995).

335. Interview with Shyam Saran, former Indian Foreign Secretary, in New Delhi, India (Aug. 24, 2013).

336. Interview with C. Raja Mohan, in New Delhi, India (Aug. 28, 2013).

337. See Statement by Ambassador Baso Sangqu, Permanent Representative of South Africa to the United Nations at the Informal Meeting Hosted by the Minister of External Relations of Brazil (Feb. 21, 2012), available at <http://www.responsibilitytoprotect.org/S%20Africa.pdf>; see also Chris Landsberg, *Pax South Africana and the Responsibility to Protect*, 2 GLOBAL RESPONSIBILITY TO PROTECT 436, 439–41 (2010); STANLEY FOUNDATION, POLICY DIALOGUE BRIEF: THE ROLES OF SOUTH AFRICA AND THE UNITED STATES FOR THE 21ST CENTURY INTERNATIONAL AGENDA (2012), available at <http://www.stanleyfoundation.org/publications/pdb/RoleUSandSouthAfrica412.pdf>.

338. Michael Ignatieff, *How Syria Divided the World*, NEW YORK REV. BLOG (July 11, 2012, 9:20 AM), <http://www.nybooks.com/blogs/nyrblog/2012/jul/11/syria-proxy-war-russia-china>.

The future development of R2P will turn on the resolution of this tension over sovereignty between and among hubs in the system. It has been suggested that R2P is "on trial" as these versions of sovereignty clash. Perhaps distinct versions of sovereignty and R2P will be championed by competing hubs and applied differently within their respective subsystems. Perhaps Russia, China, and their followers will retard the future development of the norm or at least circumscribe it more narrowly than some traditional powers might prefer.<sup>339</sup> Either way, the debate over R2P is illustrative of growing pluralism, as hubs articulate and advance their own distinct preferences.

The tension over sovereignty has implications well beyond R2P. Russia's practice is illustrative. It is seeking to ratchet back a number of international legal rules that it deems to infringe its sovereignty. For example, while Russia generally pays damages awarded by the European Court of Human Rights, it refuses to undertake domestic legal reforms in response thereto.<sup>340</sup> Russia interprets the "public policy" exception in the enforcement of internal arbitral awards<sup>341</sup> and the "political offence" exception in extradition treaties<sup>342</sup> broadly, allowing it to protect domestic interests. Beyond Russia, the tension over sovereignty is relevant to the refusal of any rising powers to ratify the Rome Statute of the ICC,<sup>343</sup> Brazil's refusal to ratify any BITs,<sup>344</sup> and China's expansive interpretation of coast-state sovereignty in the EEZ,<sup>345</sup> just to name a few. The pluralism that emerges from Russia and China's more absolutist versions of sovereignty may well push understandings of sovereignty back toward their more absolutist roots of the

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339. See Prime Minister Blair, *supra* note 281.

340. See Ole Solvang, *Russia and the European Court of Human Rights: The Price of Non-Cooperation*, 15 HUM. RTS. BRIEF 14 (2008).

341. Постановление ФАС Волго-Вятского округа от 17 февраля 2003 г., N А43-10716/02-27-10[ИСП] [Ruling of the Fed. Arbitration Ct. of Volga-Vyatka Cnty., of 17 Feb. 2003, Case No. А43-10716/02-27-10[ISP], по иску United World Inc. к ОАО "Красный Якорь" [regarding United World Ltd. v. Krasnii Yakor] (2003), <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=AVV;n=5103>. See also Diana Tapola, *Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia*, 22 ARB. INT'L. 151 (2006).

342. See, e.g., Rus.-Braz. Extradition Treaty, Jan. 14, 2002 ("The request for extradition may be denied . . . if the act is a political offence . . . if the Country from whom extradition is requested has reason to believe that the extradition request is presented with the goal of a criminal prosecution of a person . . . due to his political convictions.").

343. For a list of states parties to the Rome Statute, see COAL. FOR THE INT'L CRIM. CT., States Parties to the Rome Statute of the ICC 121 Ratifications as of 02 April 2012, [http://www.coalitionfortheicc.org/documents/RATIFICATIONSbyRegion\\_2Apr12012\\_eng.pdf](http://www.coalitionfortheicc.org/documents/RATIFICATIONSbyRegion_2Apr12012_eng.pdf).

344. See, e.g., Leany Lemos & Daniela Campello, *The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation* (Apr. 1, 2013) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2243120](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243120).

345. See Odom, *supra* note 155.

18th and 19th centuries<sup>346</sup> and, perhaps, toward greater consistency with the U.N. Charter, in which exceptions to sovereignty are rare.<sup>347</sup>

### B. Legitimacy: Input- or Output-Oriented

A second tension point emerges where new hubs are articulating preferences for a distinct form of legitimacy in international institutions and legal processes. Whereas the United States and, to a lesser degree, Europe tend to judge legitimacy based on outcomes, many rising powers focus on inputs and process.<sup>348</sup> Input legitimacy turns on what Thomas Franck describes as the “quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with the right process.”<sup>349</sup> Input legitimacy is based on the states involved in and the procedures applicable to an international legal process. Output legitimacy, in contrast, refers to the “effectiveness of an institution’s decisions and actions”<sup>350</sup> and whether they are welfare-enhancing.<sup>351</sup> Both approaches to legitimacy are relative and subjective, ultimately resting on the perception of the addressee.<sup>352</sup>

346. For a discussion of the historical development of sovereignty, see David Kennedy, *International Law in the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 119 (1997) (“By century’s end, international law would countenance but one form of political authority, absolute within its territory and equal in its relations with other sovereigns.”). Whether the Westphalian order actually reflected such a strong version of sovereignty is open to debate. Krasner, among others, has argued that such a vision of sovereignty was never achieved. See KRASNER, *supra* note 35, at 155 (“In both the nineteenth and the late twentieth centuries violations of the Westphalian model were endemic, but the model endured.”).

347. See U.N. Charter art. 2, paras. 1, 4, 7. For discussion of the vision of sovereignty in the U.N. Charter, see Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529, 581–84 (1998); Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 207–08 (1944) (“We may justifiably assume that in this declaration ‘sovereignty,’ usually defined as ‘supreme authority,’ has a meaning not incompatible with the existence of an international law which imposes duties and confers rights upon States. . . . [T]he sovereignty of States as subjects of international law can mean, not an absolutely but only a relatively supreme authority.”).

348. For a discussion, see Michael Zurn & Matthew Stephen, *The View of Old and New Powers on the Legitimacy of International Institutions*, 30 POL. 91, 94 (2010). There are a range of other approaches to legitimacy that may be relevant but are not the focus of this inquiry, for example democratic legitimacy. See John McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1192–1210 (discussing the democracy deficit).

349. Franck, *supra* note 255, at 705–06. See also THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) (analyzing legitimacy in light of rule determinacy, symbolic validation through authority, coherence, and adherence to rule hierarchy); DAVID HELD, *MODELS OF DEMOCRACY* (1996). Robert Keohane and Allen Buchanan frame a similar version of input legitimacy as turning on the perceived “right” or authority “to rule.” See Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 408 (2006).

350. For a discussion of output legitimacy, see F.W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC* 21–28 (1999); Kenneth W. Abbott & David Gartner, *Reimagining Participation in International Institutions*, 8 J. INT’L L. & INT’L REL. 1, 25–26 (2012).

351. See 2 HAROLD LASSWELL & MYRES S. McDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* 142, 217 (1992) (on the nature of authoritative decisions).

352. See FRANCK, *supra* note 349, at 41–44.

For the United States, decisions about whether to use a legal process or institution are often based on the ability of that process or institution to deliver results.<sup>353</sup> Participation and process are secondary concerns. As the 2010 U.S. National Security Strategy states with respect to institutional reform: "We need to assist existing institutions to perform effectively. When they come up short, we must . . . develop alternative mechanisms."<sup>354</sup> When it is expedient, the United States is generally willing to work outside of inclusive, participatory institutions as illustrated by the historic role of the G-7/8,<sup>355</sup> calls to establish a Concert of Democracies,<sup>356</sup> the expanding use of selective "contact groups," and the frequent reliance on ad hoc coalitions of the willing.<sup>357</sup> As some rising powers, notably Brazil and India, have articulated quite different versions of legitimacy, they have become alternative hubs and are attracting followers. These tensions over legitimacy have real ramifications for the international legal system, including, for example, the design and membership of international organizations and the emergence of a "south-south" alternative architecture of international legal agreements.

### 1. *Brazil and India's Preferences for Input Legitimacy*

Brazil places significant emphasis on input legitimacy in its foreign policy. Brazil's articulation of legitimacy based on inputs likely flows from underlying preferences rooted in past geographic exclusion, historical U.S. dominance in Latin America, and perhaps its status toward the bottom of the hierarchy of rising powers.<sup>358</sup> Brazil's Minister of Foreign Relations has described the country's top foreign policy priority as the "reconfiguration of the world's commercial and diplomatic geography" to hasten the transition to a multipolar order in which international norms and institutions no

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353. See NATIONAL SECURITY STRATEGY, *supra* note 286, at 40, 46; Andrew Hurrell, *There Are No Rules (George W. Bush): International Order After September 11*, 16 INT'L REL. 185 (2002). For descriptions of U.S. visions of legitimacy, see Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1517 (2006) ("The modern American administrative state . . . reflects this expertise- and results-based orientation to policymaking legitimacy."). For description of European approaches, particularly within the OECD context, see Claire R. Kelly, *Institutional Alliances and Derivative Legitimacy*, 29 MICH. J. INT'L L. 605, 620–21 (2008).

354. See NATIONAL SECURITY STRATEGY, *supra* note 286, at 46.

355. See, e.g., John Kirton, United States Foreign Policy and the G8 Summit, Lecture Given at the Faculty of Law, Chuo University (July 6, 2000) (on the role of the G7 and G8); see also PETER I. HAJNAL, *THE G7/G8 SYSTEM: EVOLUTION, ROLE AND DOCUMENTATION* (1999).

356. See Ivo Daalder & James Lindsay, *Democracies of the World, Unite*, AM. INT., Jan. 1, 2007; see also ANNE-MARIE SLAUGHTER & G. JOHN IKENBERRY, *FORGING A WORLD OF LIBERTY UNDER LAW: U.S. NATIONAL SECURITY IN THE 21ST CENTURY* 61 (2006) (proposing a concert of democracies).

357. See Andrew Hurrell, *Power and Legitimacy in Global Governance* (Feb. 2006) (unpublished manuscript) (noting the "growing importance [to the United States] of informal groupings of states—contact groups, core groups, groups of friends.").

358. See GABRIEL CEPALUNI, ET. AL., *BRAZILIAN FOREIGN POLICY IN CHANGING TIMES: A QUEST FOR AUTONOMY FROM SARNEY TO LULA* (2009); SEAN WILLIAM BURGESS, *BRAZILIAN FOREIGN POLICY AFTER THE COLD WAR* (2009).

longer favor the developed world at Brazil's expense.<sup>359</sup> Its efforts are aimed at creating a modicum of equality in the international system that elevates Brazil's own status and provides an alternative to U.S.-dominated legal structures.<sup>360</sup>

Brazil's assessment of legitimacy is based on inputs into the process or institution, such as the states participating in an institution and its formal sources of authority.<sup>361</sup> The current "global order still strikes many Brazilians as inequitable."<sup>362</sup> A senior Brazilian official said that "we have a major concern that the new organizations [of global governance] do not replicate the unrepresentativeness of the past."<sup>363</sup> The U.S. National Intelligence Council found that "[f]or Brazilians, the governance gap is really a legitimacy gap. Effectiveness is not just about fast decision-making but incorporating a broader range of voices."<sup>364</sup> While Brazil's goal—achieving a "seat at the table [in] multilateral institutions"<sup>365</sup>—may be self-interested, it fosters Brazil's emergence as a hub that both offers a distinct preference for legitimacy and champions that vision in the international system.

India, too, emphasizes input legitimacy.<sup>366</sup> Again, underlying interests including its colonial legacy,<sup>367</sup> the regional shadow of China,<sup>368</sup> and long-standing relationship with the Non-Aligned Movement and the G-77<sup>369</sup> are likely drivers thereof. India's approach to legitimacy may also be an international manifestation of what Amartya Sen describes as a "public reasoning" of "democracy and inequality."<sup>370</sup> India's self-identity has been "shaped by three central ideals: the importance of morality in foreign affairs, a belief in India's great-power potential, and anti-colonial solidarity with developing nations."<sup>371</sup> One former Indian Foreign Secretary has called on "governance

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359. Lecture by Ambassador Celso Amorim, Foreign Minister, Brazil (Mar. 17, 2004), *cited in* HAL BRANDS, DILEMMAS OF BRAZIL'S GRAND STRATEGY 12 (2010). For a general discussion of Brazil's foreign agenda, see Julia E. Sweig, *A New Global Player: Brazil's Far-Flung Agenda*, 89 FOREIGN AFF. 174 (2010).

360. See Hurrell, *supra* note 357 ("Countries such as . . . Brazil [argue] that the current order fails to represent the global range of cultural, racial, religious, and political values.").

361. For a discussion of Brazil's perceptions of international inequality, see BRANDS, *supra* note 363, at 10.

362. *Id.*

363. NATIONAL INTELLIGENCE COUNCIL, GLOBAL GOVERNANCE, *supra* note 78, at 28.

364. *Id.* at 43.

365. Stephanie Hanson, *Background: Brazil on the International Stage*, COUNCIL ON FOREIGN REL. (last updated July 2, 2012), <http://www.cfr.org/brazil/brazil-international-stage/p19883>.

366. See Hurrell, *supra* note 357.

367. Amrita Narlikar, *Reforming Institutions, Unreformed India?*, in RISING STATES, RISING INSTITUTIONS, *supra* note 25, at 125 ("[T]he ideational peculiarities that one associates with India's world view . . . are very much the product of a colonial past and post colonial reassertion.").

368. See, e.g., Interview with C. Raja Mohan, at New Delhi, India (Aug. 28, 2013).

369. See I. Abraham, *From Bandung to NAM: Non-Alignment and Indian Foreign Policy, 1947–1965*, 46 COMMONWEALTH AND COMPARATIVE POL. 195, 211 (2008).

370. JEAN DREZE & AMARTYA SEN, AN UNCERTAIN GLORY: INDIA AND ITS CONTRADICTIONS 243 (2013).

371. C. Raja Mohan, *Changing Global Order*, in CRUX OF ASIA, *supra* note 304, at 53. For a typology of Indian foreign policy thinking, see Deepa M. Ollapally and Rajesh Rajagopalan, *India: Foreign Policy Per-*

structures . . . [to] devolve more decision-making authority to emerging economics” and has noted the importance of “voting power” being “more evenly distributed,” including both rising powers and other under-represented states.<sup>372</sup> Beyond inclusivity, India also prioritizes process and legal authority. Prominent Indian international lawyers underscore India’s goals of “ensuring proper procedures are followed” and working within “institutions with valid sources of authority.”<sup>373</sup> In short, India emphasizes the need to “play by the rules,”<sup>374</sup> giving “greater attention to participatory and accountability legitimacy.”<sup>375</sup>

Brazil and India’s articulation of strong preferences for input legitimacy may simply be a self-interested means of ensuring their own seats at the table in the reform of the Security Council. It may also be that their claims are largely rhetorical, giving way to greater pragmatism when key national interests are at stake. But, the fact that Brazil and India are articulating this far more input-oriented legitimacy in international legal processes is generating new pluralism.

## 2. *Legitimacy as Tension Point: The Reform of the Global Institutional Architecture*

While the emerging tension over legitimacy cuts across a range of legal issues, it is most evident in present efforts to reform the international institutional architecture. In particular, in current debates around the reform of the Security Council, the appropriate role of the G20, and the establishment of “south-south” institutions, Brazil and India have become hubs for an alternative view of the structure of institutions and legal processes that prioritizes input legitimacy. In so doing, they have begun to attract followers that share preferences for more participatory institutions not dominated by traditional powers.

It is not surprising that India and Brazil have been among the loudest champions of Security Council reform. They have grounded their advocacy in terms of input legitimacy and the “democratization” of the Council.<sup>376</sup>

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spectives of an Ambiguous Power, in *WORLDVIEWS OF ASPIRING POWERS: DOMESTIC FOREIGN POLICY DEBATES IN CHINA, INDIA, IRAN, JAPAN, AND RUSSIA* 73 (Henry R. Nau & Deepa M. Ollapally, eds., 2012).

372. Shyam Saran, *The Evolving Role of Emerging Economies in Global Governance: An Indian Perspective* 35 (Working Paper, June 7, 2012), available at <http://www.kcl.ac.uk/aboutkings/worldwide/initiatives/global/indiainstitute/EmergingEconomiesPaper—final.pdf>.

373. Interview with Amit Prakash, Professor, Jawaharlal Nehru Univeristy, at New Delhi, India (Aug. 24, 2013); Interview with Manimuthu Gandhi, Faculty Member, Jindal Global Law School, at New Delhi, India (Aug. 28, 2013).

374. Christian Wagner, *India’s Gradual Rise*, 30 *POLITICS* 63, 69 (2010).

375. See Zurn & Stephan, *supra* note 348, at 99.

376. In advance of summits with President Obama in 2010 and 2011, both Brazil and India requested support for their aspirations for permanent membership. See Joe Leahy, *Obama Acknowledges Brazil’s UN Hopes*, *FIN. TIMES*, Mar. 19, 2011, <http://www.ft.com/intl/cms/s/0/1f518fec-5257-11e0-8a31-00144feab49a.html#axzz3I3O61PSa>; Sheryl Gay Stolberg & Jim Yardley, *Countering China, Obama Backs*

Brazil and India were the driving force behind the New Delhi Declaration of the IBSA (India, Brazil, South Africa) leaders, which noted that: “the U.N. Security Council, as configured today is not representative of present-day realities. [Reform must lead to] greater balance and representativeness.”<sup>377</sup> Former Brazilian President Lula was a vocal champion of an “international order that is sustainable, multilateral, and less asymmetric, free of hegemonies, and ruled by democratic institutions.”<sup>378</sup> Even the G4 group (Germany, Brazil, India and Japan), generally thought to be most likely to achieve permanent membership, has advocated for Council expansion beyond itself, demanding “increased representation of developing countries.”<sup>379</sup> This articulation of legitimacy based on participation and democratization, even if purely strategic, contrasts starkly with the U.S. position, informed by output legitimacy, which seeks fewer new members<sup>380</sup> so as “not to diminish [the Council’s] effectiveness or efficiency.”<sup>381</sup>

Brazil and India’s particular versions of legitimacy also manifest in debates over the evolution of the G20. It is not surprising that they have welcomed the elevation of the G20 and the relative decline of the G8.<sup>382</sup> What is surprising is that India and Brazil have noted the legitimacy deficit of the G20 due to its lack of formal legal authority.<sup>383</sup> For Brazil and India, neither of the G20’s claims to legitimacy—its effectiveness in responding to the 2008 economic crisis and the economic power of its members<sup>384</sup>—satisfies the requirements for input legitimacy. As a result, they have resisted efforts to expand the G20 agenda beyond pure economic coordination to issues such as climate finance and development.<sup>385</sup> They have particularly

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*India for UN Council*, N.Y. TIMES, Nov. 8, 2010, <http://www.nytimes.com/2010/11/09/world/asia/09prexy.html>.

377. IBSA (India, Braz., S. Afr.) Dialogue Forum, *New Delhi Agenda for Cooperation*, at art. 6 (Mar. 5, 2004). Similar themes have been reiterated at each IBSA meeting. See also Tshwane Declaration, *supra* note 181.

378. Luiz Ignácio Lula da Silva, President of Brazil, Speech at the Plenary Meetings of the 64th General Assembly (Sept. 23, 2009), available at [http://www.un.org/ga/64/generaldebate/pdf/BR\\_en.pdf](http://www.un.org/ga/64/generaldebate/pdf/BR_en.pdf).

379. See Joint Press Statement, Ministerial Meeting of the G4 Countries (Braz., Ger., India, Japan) in the Margins of the 67th Session of the U.N. General Assembly (Sept. 25, 2012), [http://www.mofa.go.jp/policy/un/pko/joint\\_1209.html](http://www.mofa.go.jp/policy/un/pko/joint_1209.html).

380. See Ambassador John R. Bolton, Statement in the U.N. General Assembly (Nov. 10, 2005) (noting the need to limit expansion so as not to “weaken” its “ability to act”).

381. Ambassador Susan E. Rice, Statement at an Informal Meeting of the General Assembly on Security Council Reform (Feb. 19, 2009).

382. See Andrew F. Cooper, *Squeezed or Revitalized, Middle Powers, the G20, and the Evolution of Global Governance*, 34 THIRD WORLD Q. 963 (2013).

383. For a discussion of the legitimacy deficit, see Paola Subacchi & Stephen Pickford, *Legitimacy vs. Effectiveness for the G20: A Dynamic Approach to Global Economic Governance* (2011); NAT’L INTELLIGENCE COUNCIL, GLOBAL GOVERNANCE, *supra* note 78, at 44.

384. See Robert Wade and Jakob Vestergaard, *Overhaul of the G20 for the Sake of the G172*, FIN. TIMES, Oct. 21, 2010 (noting critiques of the G20 as “a self-appointed and barely legitimate body that has no authority to assume its current role”), available at <http://www.ft.com/intl/cms/s/0/a2ab4716-dd45-11d1-9236-00144feabdc0.html#axzz3EEMdtZJcI>.

385. For example, while the G20 has established a Climate Finance Study Group, that group merely reaffirmed the preeminence of the UNFCCC in addressing climate change, so as to avoid “duplication with UNFCCC processes.” G20 Climate Finance Study Group, Progress Report to G20 Leaders. See also

sought to prevent its move into political issues. As Indian Prime Minister Singh stated at the 2012 summit: "I believe that the G20 agenda is getting overburdened. We need to refocus on a few goals rather than dissipating energies on too many fronts."<sup>386</sup> Brazilian officials, too, have expressed skepticism over the G20's expanding role and argued that there is a real need to enhance its legitimacy by narrowing its focus.<sup>387</sup>

Brazil and India's concerns about the G20's legitimacy deficit are attracting followers even among G20 members. For example, when the United States has raised political issues, such as sanctions on Iran or the use of chemical weapons by Syria, on the sidelines of the G20, India and Brazil have distanced themselves and other states have followed.<sup>388</sup> Only the U.K., France, and Germany joined Obama in his statement on Iran in 2009 and none of the BRICs joined his 2013 Syria statement.<sup>389</sup> South Africa has found Brazil and India's concerns compelling. In the words of one South African official, "[i]nstead of looking at what the G-20 will look like in 2025, we should ask what will make it credible and legitimate . . . how do you ensure that voices outside the G-20 are heard . . . ?"<sup>390</sup> While South Korea and Mexico have been active G20 participants, each hosting a summit, they too have joined Brazil and India in raising legitimacy concerns due to the G20's limited membership<sup>391</sup> and have focused their respective presidencies on outreach to non-members.<sup>392</sup>

The preference for input based legitimacy articulated by Brazil and India is also a factor in the establishment of new "south-south" legal relationships. Such "south-south" structures are often perceived by participating

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Leonardo Martínez-Díaz, *The G20 after Eight Years: How Effective a Vehicle for Developing-Country Influence?* 16 (Brookings Inst. Working Paper No. 12, 2007) (noting developed and developing countries' divergent goals for the G20).

386. Prime Minister Singh, Address to the Plenary Session of the G20 Summit (June 19, 2012), available at <http://www.g20india.gov.in/pdfs/loscabos-link2.pdf>.

387. See Stanley Foundation Policy Dialogue Brief, *supra* note 337; Hurrell, *supra* note 130, at 62.

388. For example, on Syria, see the statement on the sidelines of the 2013 G20 meeting, which was joined by eleven G20 members. Press Release, Joint Statement on Syria, The White House (Sept. 6, 2013), available at <http://www.whitehouse.gov/the-pres-office/2013/09/06/joint-statement-syria>. Note, however, that other G20 members resisted. See Peter Baker and Steven Lee Myers, *Obama Falls Short on Wider Backing for Syria Attack*, N.Y. TIMES (Sept. 6, 2013), available at <http://www.nytimes.com/2013/09/07/world/middleeast/obama-syria-strike.html?pagewanted=all&r=0>.

389. N.Y. TIMES (Sept. 6, 2013), *supra* note 388. During the Pittsburgh G20 meeting in 2010, President Obama sought to issue a side statement on Iran's nuclear program, which the BRICs refused to join. See *Leaders React to Iran's Nuclear Facility*, WALL ST. J. BLOG (Sept. 25, 2009, 9:53 AM), <http://blogs.wsj.com/g20/2009/09/25/leaders-react-to-irans-nuclear-facility/>.

390. NAT'L INTELLIGENCE COUNCIL, GLOBAL GOVERNANCE, *supra* note 78, at 21.

391. Interview with Shyam Saran in Delhi, India (Aug. 24, 2013).

392. See Gerardo Rodríguez Regordosa, Presidencia de México del G-20: labores de diálogo y consulta rumbo a la cumbre de Los Cabos, EL ECONOMISTA (Apr. 11, 2012), <http://eleconomista.com.mx/columnas/columna-invitada-valores/2012/04/10/presidencia-mexico-g-20-labores-dialogo-consulta-rumbo>; Wongi Choe, The Role of Korea in the G20 Process and the Seoul Summit (May 20, 2010) (unpublished manuscript) (discussing "outreach to nonmember countries"), available at <http://www.g8.utoronto.ca/g20/biblio/choe-kans.pdf>. South Korean President Lee Myung-bak has called for consultations that are "as inclusive as possible." Lee Myung-bak, President of the Republic of Korea, Seoul G20 Summit: Priorities and Challenges, Address at the Davos Forum (Jan. 28, 2010).



states as more legitimate than the predominantly “north-north” and “north-south” orientation of existing structures<sup>393</sup> due to leadership, membership, processes, and, in some cases, ideology.<sup>394</sup> Brazil and India have both been active in convening the now annual BRICS summit and used the forum to champion what they viewed to be a more legitimate international architecture.<sup>395</sup> At their first summit meeting in 2009, the BRICS articulated the goal of advancing “a more democratic and just multi-polar world order based on the rule of international law, equality, mutual respect, cooperation . . . and collective decision-making of all states.”<sup>396</sup> At the 5th Summit in 2013, the BRICS (then including South Africa) called for an “inclusive approach [to the international system based on] shared solidarity and cooperation towards all nations and peoples” that would be “more equitable.”<sup>397</sup> Rhetorically, this vision also lies behind the 2013 agreement to establish a BRICS development bank and a reserve fund, which are framed as more legitimate than existing institutions.<sup>398</sup>

As discussed earlier, Brazil has been particularly active in cultivating a range of “south-south” alternative institutions and legal relationships, including IBSA, UNASUR and Mercosur.<sup>399</sup> For then-President Lula, the purpose of these “south-south” relations was to move “beyond old conformist alignments with traditional centers [of power]” by “designing a multipolar world,” complemented by Brazil’s own “solidarity initiatives with poorer countries.”<sup>400</sup> Not only have these efforts been aimed at building a legal subsystem with Brazil at the center, but they have also been intended to advance Brazil’s preferences for legitimacy. When it hosted the first IBSA meeting in 2006, Brazil touted the unique “shared vision of the three countries.”<sup>401</sup> Similarly, Lula sought to revitalize Mercosur based on what might

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393. See Chris Alden & Marco Antonio Vieira, *The New Diplomacy of the South: South Africa, Brazil, India and Trilateralism*, 26 *THIRD WORLD Q.* 1077, 1088–92 (2005).

394. See Oliver Stuenkel, *Institutionalizing South-South Cooperation: Towards a New Paradigm*, (May 2013) (unpublished manuscript), available at [http://www.post2015hlp.org/wp-content/uploads/2013/05/Stuenkel\\_Institutionalizing-South-South-Cooperation-Towards-a-New-Paradigm.pdf](http://www.post2015hlp.org/wp-content/uploads/2013/05/Stuenkel_Institutionalizing-South-South-Cooperation-Towards-a-New-Paradigm.pdf).

395. For example, Russia seeks to maximize engagement with institutions that are “representative in geographical and civilizational terms,” including “the Group of Twenty, BRICS . . . the Group of Eight, the Shanghai Cooperation Organization, the RIC (Russia, India and China)”. See Концепция Внешней Политики Российской Федерации 2013, *supra* note 292.

396. Joint Statement of the BRIC Countries’ Leaders (June 16, 2009), available at <http://archive.kremlin.ru/eng/text/docs/2009/06/217963.shtml>.

397. Declaration at Fifth BRICS Summit in Durban, S. Afr., arts. 1–2 (Mar. 27, 2013), available at <http://www.brics5.co.za/about-brics/summit-declaration/fifth-summit/>.

398. Andrew England, *BRICS Agree to Create Development Bank*, *FIN. TIMES* (Mar. 27, 2013), <http://www.ft.com/cms/s/0/2bcbd6e0-96e5-11e2-a77c-00144feabdc0.html#axzz3I3O61PSa>.

399. See BRANDS, *supra* note 359, at 23 (“Brazilian officials have worked to formalize South-South cooperation.”).

400. Luiz Inácio Lula da Silva, President of Brazil, Address at the U.N. General Assembly (Sept. 23, 2008).

401. Tshwane Declaration, *supra* note 178.

be described as a “Mercosur identity” (*identidade mercosulina*) grounded in norms of legitimacy and equality.<sup>402</sup>

Brazil has attracted followers in the process. Venezuela has actively sought to join Mercosur with Brazil’s help<sup>403</sup> and numerous Latin American and Caribbean states welcomed Brazil’s invitation to the first Summit of Latin American and Caribbean States in 2010.<sup>404</sup> Bolivian President Evo Morales described this new grouping as “the weapon against imperialism” and Ecuadorian President Rafael Correa referenced its legitimacy, suggesting that, compared to other forums, it can be much more effective “to solve by ourselves our own problems, with our own strengths and our own visions.”<sup>405</sup> Chilean, Cuban, and Venezuelan officials traveled to another hub sharing this view of legitimacy, India, to discuss closer cooperation between the BRICS and the new Community of Latin American and Caribbean States based on a shared vision for a new international architecture.<sup>406</sup>

This tension over legitimacy has ramifications beyond just institutional reform. In international environmental law, for example, President Obama convened the Major Economies Forum (MEF), representing the seventeen largest economies of the world to “facilitate a candid dialogue among major developed and developing economies.”<sup>407</sup> In so doing, he sought both to move beyond the climate impasse and beyond a vision of legitimacy based either on participation or democracy.<sup>408</sup> India, Brazil and other rising powers, despite being MEF participants, have questioned the MEF’s legitimacy and urged action instead at the 193-member UNFCCC.<sup>409</sup> In the trade context, rising powers have questioned the use of informal negotiations of

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402. Tiago Luiz Koeche, *Discurso do Presidente Lula na X Cúpula Social do Mercosul Foz do Iguaço*, YOUTUBE (Dec. 17, 2010), [http://www.youtube.com/watch?v=5Y\\_L-ageDsM](http://www.youtube.com/watch?v=5Y_L-ageDsM); see also Maria Angélica Oliveira, *Em despedida do Mercosul, Lula defende identidade regional*, GGN (Dec. 17, 2010), <http://jornalggm.com.br/blog/luisnassif/a-despedida-de-lula-no-mercossul>.

403. Simon Romero, *With Brazil as Advocate, Venezuela Joins Trade Bloc*, N.Y. TIMES (July 31, 2012), <http://www.nytimes.com/2012/08/01/world/americas/mercossur-trade-bloc-admits-venezuela-as-full-member.html>.

404. Camarena, *supra* note 180. See also XINHUA NEWS (Dec. 4, 2011), *supra* note 180.

405. *South America to Create New EU-Type Bloc to Defy US*, DEUTSCHE WELLE (Feb. 26, 2010), <http://dw.de/p/MD7j>; *Correa confía en la recién creada Comunidad de Estados Latinoamericanos y Caribeños*, TELESUR (Feb. 23, 2010), <http://exwebserv.telesurtv.net/secciones/noticias/67340-NN/correa-confia-en-la-recien-creada-comunidad-de-estados-latinoamericanos-y-caribenos/#%A0>.

406. See Sandeep Dikshit, *Latin American Bloc for Working Closely with BRICS*, THE HINDU (May 28, 2013), <http://www.thehindu.com/business/Economy/latin-american-bloc-for-working-closely-with-brics/article4757194.ece>.

407. Major Economies Forum Fact Sheet, MAJOR ECONOMIES FORUM (Apr. 20, 2010), available at <http://www.majoreconomiesforum.org/images/stories/documents/the%20major%20economies%20forum%20april%202010.pdf>.

408. Timmons Roberts, *Beyond the Climate Impasse: How the Major Economies Forum Can Lead the Way*, BROOKINGS UPFRONT (Apr. 8, 2013), <http://www.brookings.edu/blogs/up-front/posts/2013/04/08-climate-economies-robertst>.

409. See Daniel Bodansky & Lavanya Rajamani, *The Evolution and Governance Architecture of the Climate Change Regime* (Oct. 28, 2012) (unpublished manuscript); Harvard Project on Climate Agreements, *Policy Brief: Institutions for International Climate Governance*, BELFER CENTER (2010) (stressing the UNFCCC’s “international legitimacy, particularly among developing countries”).

smaller groups of states in the WTO "Green Room," arguing for more open and transparent negotiations that reflect the broad membership of the organization.<sup>410</sup>

In human rights, legitimacy tensions underscore debates over the universality of human rights norms and the appropriateness of foreign institutions judging domestic human rights practices.<sup>411</sup> Ultimately, to borrow the words of one Indian critic: "If new powers . . . are to be accommodated effectively in international institutions, considerably more attention will have to be devoted to how their notions of fairness and legitimacy differ" from those currently embedded in the rules of international law and institutions.<sup>412</sup>

The distinct preference for legitimacy based on inclusivity advanced by hubs such as Brazil and India tracks the traditional sovereign equality of states that has long been fundamental to the international legal system.<sup>413</sup> These preferences for legitimacy, like those for more absolutist versions of sovereignty, reassert the role and centrality of the state in international law. This version of participatory legitimacy and sovereign equality is, however, in tension with the structural pressures identified in Part III that are driving legal processes toward separate subsystems based on variable geometry. Such subsystems, by their nature, are not inclusive. It may be that, overtime, rising powers' preferences for legitimacy will manifest themselves differently at the global and subsystem levels. Globally, these hubs may demand more inclusive, participatory processes, which, in turn, make global level legal processes more difficult. At the subsystem level, in contrast, they may focus their legitimacy demands instead on alternative ideological preferences shared with potential followers.

### C. *Economic Development: Neo-Liberal or Neo-Statist*

A third emerging tension point where the preferences of some rising powers conflict with those embedded in the present international legal system is the role of the state in economic development. To a large degree, modern international economic law reflects the norms of the so-called Washington Consensus: liberalization of trade and foreign direct investment, fiscal disci-

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410. See Sonia Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT'L L.J. 483, 525 (2007) (noting criticism of the unrepresentative "Green Room"). For formal criticisms of the Green Room process, see General Council, *Minutes of the Meeting held in the Centre William Rappard on 17 and 19 July 2000*, WT/GC/M/57, at para. 159 (Sept. 14, 2000). For discussion of Brazil's and India's positions, see Andrew Hurrell & Amrita Narlikar, *A New Politics of Confrontation? Brazil and India in Multilateral Trade Negotiations*, 20 GLOBAL SOCIETY 415 (2006). Those efforts have in part succeeded with the transformation of the Green Room into a somewhat more representative "Chairman's Consultative Group."

411. For legitimacy criticism of the universality of human rights, see Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281 (2007).

412. Narlikar, *supra* note 367, at 125.

413. See VATTTEL, *supra* note 10, at § 18 (on the "equality of nations").

pline, privatization, and deregulation.<sup>414</sup> Over time, the contour of that consensus has shifted<sup>415</sup> and both the trade and investment law regimes have adapted along with it.<sup>416</sup> These fields of international law nonetheless generally seek to limit the role of the state and state interventions in the market. Some rising powers have begun to challenge more directly aspects of the Washington Consensus embedded in the trade and investment regimes as they advance their own development strategies.<sup>417</sup> Specifically, they view the state as a more central actor in economic development and prioritize poverty reduction through inclusive growth, even where market intervention is required. Some observers have termed this approach a neo-statist<sup>418</sup> development strategy, distinct from both the Washington Consensus and historical statism.<sup>419</sup> Brazil, India, and China have become hubs for these new preferences, advancing them in international legal regimes and attracting followers. Specifically, some of these hubs have begun shifting the substantive norms of international investment law in a more protectionist direction and creating alternative trade norms that are both more interventionist and prioritize inclusive development.

### 1. *Brazil, India, and China's New State Activism*

While Brazil, India, and China have all embarked on different paths of economic reform and development, their strategies emphasize inclusive growth and new state activism. Brazil has designed a development policy in which “the government plays an active role mobilizing resources, stimulating investment, and promoting innovation, but does not command or control the economy.”<sup>420</sup> There are structural and domestic political explanations for this approach—poverty remains a serious problem in a large

414. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* (John Williamson ed., 1990).

415. See Moises Naim, *Washington Consensus or Washington Confusion?*, 118 *FOREIGN POL'Y* 87, 103 (2000) (tracing changes to the consensus); Joseph E. Stiglitz, *Is There a Post-Washington Consensus Consensus?*, in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE* 41 (Narcis Serra & Joseph E. Stiglitz eds., 2008).

416. See SONIA E. ROLLAND, *DEVELOPMENT AT THE WTO* 12 (2012) (on trade); Jeswald Salacuse, *The Treatification of International Investment Law*, 13 *AM. LAW & BUS. REV.* 155 (2007) (on investment).

417. See Rolland, *supra* note 218, at 165 (noting that the BRICs “have come to view themselves as an alternative voice to the traditional Washington consensus”).

418. See David M. Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* (University of Wisconsin Legal Studies Research Paper No. 1075, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1349163](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349163).

419. See generally *THE STATE AFTER STATISM: NEW STATE ACTIVITIES IN THE AGE OF LIBERALIZATION* (Jonah D. Levy ed., 2006); David M. Trubek, Diogo R. Coutinho & Mario G. Schapiro, *Toward a New Law and Development: New State Activism in Brazil and the Challenge for Legal Institutions*, in *WORLD BANK LEGAL REVIEW* 281 (Hassane Cisse, Daniel Bradlow, & Benedict Kingsbury eds., 2011).

420. See Trubek et al., *supra* note 419, at 281–82; see also Glauco Arbix & Scott Martin, *Beyond Developmentalism and Market Fundamentalism in Brazil: Inclusionary State Activism Without Statism* (Workshop on “States, Development, and Global Governance,” unpublished working paper, 2010), available at [http://media.law.wisc.edu/s/c\\_360/mq4fw/paper\\_arbix.pdf](http://media.law.wisc.edu/s/c_360/mq4fw/paper_arbix.pdf).

democratic polity.<sup>421</sup> Under President Lula, Brazil's state activism led to industrial policies, subsidies, and tax incentives to advance Brazil's "competitive edge."<sup>422</sup> In 2011, President Rousseff, launched the *Brazil Maior* program, intended further to increase competitiveness in select sectors, through tax relief, special financing, legal reform, and public-private coordination.<sup>423</sup> Concurrent with this expanded state activism, Brazil has built social programs aimed at poverty alleviation and wealth redistribution, such as Lula's *Bolsa Familia* "conditional cash transfer program" and Rousseff's *Brasil Sem Miséria* poverty-alleviation program.<sup>424</sup> It may be premature to term these efforts a truly new development model, but over the past decade "a new form of industrial policy stressing state assistance for innovation and competitiveness . . . has been combined with a robust social policy" aimed at poverty alleviation.<sup>425</sup>

The Indian economy has undergone significant reforms since 1991, but growth and wealth distribution remain central goals.<sup>426</sup> India's response to domestic poverty challenges has been informed by Amartya Sen's concept of "Development as Freedom," leading to an emphasis on human development and poverty alleviation.<sup>427</sup> The central tenet of India's 11th Five Year Plan is "broad-based and inclusive growth . . . focus[ing] on poverty reduction."<sup>428</sup> Given India's "domestic politics {and} . . . the scale and nature of its poverty,"<sup>429</sup> the state is seen as "the only social instrument potentially capable of . . . implementing" its development plan.<sup>430</sup> The state is "central to development."<sup>431</sup> The Indian government has been extremely active intervening in the domestic market to alleviate poverty and provide food security.<sup>432</sup>

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421. Brazil's per capita GNI is only \$11,690 and as of 2012, more than 9% of the population still lived below the poverty line. Country Data, *Brazil*, WORLD BANK, <http://data.worldbank.org/country/brazil> (last visited Sep. 27, 2013).

422. On Lula's first industrial policy, PITCE, see Trubek et al., *supra* note 419, at 291.

423. *Id.* at 292–93; see also Lecio Morais & Alfredo Saad-Filho, *Neo-Developmentalism and the Challenges of Economic Policy-Making Under Dilma Rousseff*, 38 CRIT. SOCIOLOGY 1 (2012).

424. See *Brazil: Happy Families*, ECONOMIST, Feb. 7, 2008, available at <http://www.economist.com/node/10650663>; *Brazil launches scheme to lift millions out of poverty*, BBC.COM, June 2, 2011, available at <http://www.bbc.com/news/world-latin-america-13626951>.

425. Trubek et al., *supra* note 419, at 313.

426. See Montek Ahluwalia, *Economic Reforms in India Since 1991: Has Gradualism Worked?*, 16 J. ECON. PERSPECTIVES 67 (2002).

427. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2010).

428. GOV'T OF INDIA, ELEVENTH FIVE YEAR PLAN (2007–2012) 44 (2006), available at [http://planingcommission.nic.in/plans/planrel/fiveyr/11th/11\\_v1/11th\\_vol1.pdf](http://planingcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11th_vol1.pdf).

429. Narlikar, *supra* note 370, at 107. India's per capita GNI is only \$1,570; 21.9% of the population lives below the poverty line. Country Data, *India*, WORLD BANK (last visited Nov. 1, 2014).

430. BARBARA HARRISS-WHITE & S. JANAKARAJAN, *RURAL INDIA FACING THE 21ST CENTURY* 451 (2004).

431. *Id.*

432. Recent examples include the Mahatma Gandhi National Rural Employment Act that "guarantee[s] [one] hundred days of wage-employment in a financial year to a rural household" and food security legislation that provides subsidized food to 2/3 of the country's population. See Mahatma Gandhi NREGA, Ministry of Rural Development, Government of India, available at <http://nrega.nic.in/netnrega/home.aspx>; *Government Notifies Food Security Law*, TIMES OF INDIA (Sept. 15, 2013). Both programs involve subsidies that will "widen India's high fiscal deficit" and are therefore out of alignment with the

It has embraced the idea that the effective use of state power, including market interventions, subsidies, and industrialization policies, can significantly advance development objectives.<sup>433</sup> In Sen's words, India seeks to "harness the constructive role of the state for growth and development."<sup>434</sup>

While "the Chinese economy has moved unmistakably toward the market doctrines of neoclassical economics," its approach also exhibits some of the dual features of state activism and poverty alleviation.<sup>435</sup> Ultimately, China's development policy—particularly as manifested in foreign policy—is complex and, at times, inconsistent, driven by multiple domestic power centers with contradictory agendas.<sup>436</sup> To say that China follows a so-called "Beijing Consensus," based on innovation-led productivity, sustainable, balanced growth, and a direct challenge to the Washington Consensus development model, is inaccurate.<sup>437</sup> Yet, "China's government has routinely intervened in the economy, using both macro and micro economic tools."<sup>438</sup> From state banks to state-owned enterprises,<sup>439</sup> from energy subsidies<sup>440</sup> to state-led resource security efforts in Africa,<sup>441</sup> the Chinese state pursues national economic development. Notwithstanding significant increases in per capita GDP over the past decades, poverty remains a significant concern in China.<sup>442</sup> Particularly to the degree that the Chinese government depends on "legitimat[ion] by their socioeconomic performance," ensuring inclusive growth and poverty reduction will remain a priority.<sup>443</sup> Both of these themes

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Washington Consensus. See Rama Lakshmi, *India Launches Ambitious Food Subsidy Program*, WASH. POST (Jul. 3, 2013).

433. See ATUL KOHLI, STATE-DIRECTED DEVELOPMENT: POLITICAL POWER AND INDUSTRIALIZATION IN THE GLOBAL PERIPHERY 2, 286–87 (2004); JØRGEN DIGE PEDERSEN, GLOBALIZATION, DEVELOPMENT AND THE STATE: THE PERFORMANCE OF INDIA AND BRAZIL SINCE 1990 26 (2008).

434. JEAN DREZE & AMARTYA SEN, AN UNCERTAIN GLORY: INDIA AND ITS CONTRADICTIONS 39 (2013) (emphasis omitted).

435. Yang Yao, *The End of The Beijing Consensus: Can China's Model of Authoritarian Growth Survive?*, FOREIGN AFF., Feb. 2, 2010, available at <http://www.foreignaffairs.com/articles/65947/the-end-of-the-beijing-consensus>.

436. See SHAMBAUGH, *supra* note 74, at 128 (describing developing world's "mixed view" of China's international development policy).

437. See STEFAN HALPER, THE BEIJING CONSENSUS: LEGITIMIZING AUTHORITARIANISM IN OUR TIME (2012); JOSHUA COOPER RAMO, THE BEIJING CONSENSUS: NOTES ON THE NEW PHYSICS OF CHINESE POWER (2004); Scott Kennedy, *The Myth of the Beijing Consensus*, 19 J. CONTEMP. CHINA 461, 470 (2010).

438. Kennedy, *supra* note 437, at 471.

439. See generally Claustre Bajona & Tianshu Chu, *Reforming State Owned Enterprises in China: Effects of WTO Accession*, 13 REV. ECON. DYNAMICS 800 (2010); Deepak Lal, *China's Statist Turn II: The 'Development' Bank*, CATO Institute (2013), [www.cato.org/publications/commentary/chinas-statist-turn-ii-development-bank](http://www.cato.org/publications/commentary/chinas-statist-turn-ii-development-bank).

440. See generally Boqiang Lin & Zhujun Jiang, *Estimates of Energy Subsidies in China and Impact of Energy Subsidy Reform*, 33 ENERGY ECON. 273 (2011).

441. See generally CHINA RETURNS TO AFRICA, *supra* note 128.

442. Approximately one hundred million Chinese live on less than \$1 a day. See S.C., *World-class Poverty*, THE ECONOMIST (Feb. 27, 2013), <http://www.economist.com/blogs/analects/2013/02/chinas-poor>.

443. See Stephen White, *Economic Performance and Communist Legitimacy*, 38 WORLD POL. 462, 463 (1986). For discussion related to China, see Yu Ling & Dingding Chen, *Why China Will Democratize*, 35 WASH. Q. 41, 42–44 (2012).

are evident in China's 12th Five Year Plan (2011-2015), which calls for elevating "the core competitiveness of manufacturing industry [and] improving the new and strategic industries . . . ." <sup>444</sup> The plan nonetheless recognizes that "'fundamental' end of economic transformation is to improve people's lives . . . [by] stepping up reform of the income distribution system." <sup>445</sup>

Brazil, India, and China's preferences for state activism in economic development are likely to evolve based on domestic constraints and shifting roles in the global economy. Despite some similarities in terms of increased state activism and inclusive growth, the three states' approaches do not always align. <sup>446</sup> Yet, they are collectively embracing "the primacy of the market" while recognizing "a major role for the state," in "maintaining some controls on capital flows" and promoting "export industries" <sup>447</sup> through "close government-business cooperation" <sup>448</sup> that leads to "growth with equity." <sup>449</sup> They do not seek to overturn the international economic order itself, but they do have common interests in adapting it to their preferences for state-led economic development.

## 2. *Economic Development as Tension Point: The Role of the State in Investment and Trade Law*

The preferences of Brazil, India, and China for a greater role for the state in economic development manifest themselves in international investment law. International investment law is, at its core, a mechanism to provide enforceable protections to investors that, in turn, limit the ability of states to discriminate against or otherwise harm foreign investment. Investment law thereby restricts the possibilities for state intervention in the domestic economy. <sup>450</sup> Since the first BIT was signed between Germany and Pakistan in 1959, BITs have swept the globe, with more than 3,000 in force today. <sup>451</sup>

444. National People's Congress, 12th Five Year Plan (2011), EU translation, available at [http://ec.europa.eu/regional\\_policy/international/pdf/china\\_draft\\_12th\\_5yearplan17032011.pdf](http://ec.europa.eu/regional_policy/international/pdf/china_draft_12th_5yearplan17032011.pdf).

445. *Id.*

446. See Nouriel Roubini, *The BRICs: An Analysis*, FORBES (Jun. 18, 2009), <http://www.forbes.com/2009/06/17/bric-russia-india-china-renminbi-yekaterinberg-opinions-columnists-roubini.html> ("[T]here are significant differences between the BRICs . . .").

447. David Trubek, *Reversal of Fortune? International Economic Governance, Alternative Development Strategies, and the Rise of the BRICs* 7 (June 2012) (unpublished paper presented at the European University Institute), available at [https://media.law.wisc.edu/s/c\\_638/3fwq9/eui\\_paper\\_final\\_june\\_2012.pdf](https://media.law.wisc.edu/s/c_638/3fwq9/eui_paper_final_june_2012.pdf).

448. See Charles Gore, *The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries*, 28 WORLD DEVELOPMENT 789, 797 (2000), cited in Trubek, *supra* note 447, at 7.

449. See James Cyher, *Brazil's Development Strategy: Maintaining the Industrial Base, Side Stepping the Staples Trap* 3 n.4 (2012) (unpublished paper presented at Congress of the Latin American Studies Association).

450. See generally Kenneth Vandeveld, *The Political Economy of A Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 627-28 (1998) (noting that "BITS present themselves as quintessentially liberal documents . . . liberalism thus favors limited state intervention").

451. See Sam Halabi, *Efficient Contracting Between Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 NW. J. INT'L L. & BUS. 261, 272 (2011).

Brazil, India, and China have all, in quite different ways, resisted this development, articulating preferences for a version of international investment law that leaves more room for state action.<sup>452</sup>

Brazil has long been skeptical of the strong investor protections found in BITs. While it concluded 14 BITs in the 1990s, none were ratified due to domestic political concerns that the treaties would limit the ability of the state to control foreign capital flows.<sup>453</sup> Amendments proposed by leftist parties would have expanded state control over both access to arbitration and capital flows, but even these amendments failed to secure needed political support.<sup>454</sup> Brazil's failure to ratify any BITs flowed from a view that "national regulation was about disciplining foreign investment, and BITs were about restricting the state's scope to effectively regulate capitals *sic.*"<sup>455</sup> As claims have mounted against states that had ratified BITs and investor-state arbitral tribunals have offered more expansive interpretations of the treaties' substantive protections,<sup>456</sup> other states have started to follow Brazil's lead, renouncing their BITs and exiting from the International Center for the Settlement of Investment Disputes ("ICSID"), where BIT claims are usually adjudicated. Bolivia, Venezuela, and Ecuador have each exited or indicated plans to withdraw from ICSID and renounced some BITs.<sup>457</sup> Here Brazil's role as a hub is atypical, in that it has not sought to construct legal regimes that reflect its preferences. Rather its hub status flows from its demonstration to developing countries that successful development and FDI inflows do not depend on offering BIT protections to investors.<sup>458</sup>

Unlike Brazil, China has been a very active participant in the investment law system, and emerged as an early hub, articulating preferences for treaties that provided more limited protection for investors and preserving more state freedom of action than did the agreements promoted by the United States and most European states. China's early BITs (negotiated in the 1980s and 90s) limited national treatment protections so as to facilitate favoritism

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452. This resistance is demonstrated in part through non-membership in the ICSID Convention. While China is a party to ICSID, neither India nor Brazil is: Russia has signed, but not ratified. See List of Contracting States and Other Signatories to the Convention, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (May 20, 2013).

453. See Leany Lemos & Daniela Campello, *The Non Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation*, 18–19 (UnB, Brazilian Federal Senate, Princeton University Working Paper, 2013).

454. See *id.* at 20.

455. *Id.*

456. See William Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 Asian J. WTO & Int'l Health L. & Pol'y 199, 200 (2008).

457. See, e.g., *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (May 16, 2007), <http://icsid.worldbank.org/ICSID/StaticFiles/.html>; *Ecuador Submits a Notice Under Article 71 of the ICSID Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (July 9, 2009), <http://icsid.worldbank.org/ICSID/StaticFiles/Announcement20.html>.

458. See Andrew Guzman, *Why LCDs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 643 (1997).



for state-owned enterprises.<sup>459</sup> While second generation BITs (negotiated after 1998) liberalized investment flows somewhat, they still included clauses that subjected the national treatment obligation to domestic law and had extensive non-conforming-measures carve-outs.<sup>460</sup> China entered into such treaties with more than 100 states, becoming a powerful hub for a more restrictive version of investment law.<sup>461</sup> Over the past fifteen years, many countries with similar state-centric approaches to development have found this second generation Chinese model attractive. Russia, for example, has followed. Its 1992 and 2001 model treaties include exemptions from national treatment, such that the Russian government could likewise provide subsidies or other benefits to domestic industries and screen foreign capital flows.<sup>462</sup> Moreover, many Russian BITs limit the scope of arbitration to the “amount or mode of payment of compensation for expropriation,” thereby restricting international review of domestic regulation.<sup>463</sup>

The story of hub leadership in investment law is, however, more complex because, while a number of states have followed the model advanced by China between 1998 and 2010, China’s own preferences have shifted as it has become a major capital exporter. China’s most recent BITs are far more investor-friendly, narrowing the space for government intervention.<sup>464</sup> The current U.S.-China BIT negotiation highlights both China’s changing preferences and the remaining tension over the role of the state in economic development. China initially resisted U.S. demands for pre-investment protections, which would preclude governmental screening of FDI flows, and sought to have all existing non-conforming measures exempted from BIT protection.<sup>465</sup> In July 2013, China appeared to take a significant step in the direction of liberalization, agreeing with the United States to discuss pre-

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459. Axel Berger, *China’s New Bilateral Investment Treaty Program: Substance, Rationale and Implications for International Investment Law Making*, 8 (2008) (paper presented at the ASIL International Economic Law Interest Group).

460. See, e.g., Agreement concerning the Promotion and Reciprocal Protection of Investments with Exchanges of Notes, China-U.K., art. 3.3, May 15, 1986; Agreement Concerning the Encouragement and Reciprocal Protection of Investment, China-Japan, art. 3.1, Aug. 1988.

461. China has negotiated at least 131 BITs, of which 102 are in force. See Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China following the global trend toward comprehensive agreements?*, 6 (July 2013) (German Development Institute Discussion Paper).

462. See Noah Rubins & Evgenia Rubina, *Russia: Overview of Investment Treaty Program*, GLOBAL ARB. REV., Sept. 10, 2014, available at [http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/26/russia/#ftr\\_1](http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/26/russia/#ftr_1). At least 15 of Russia’s BITs contain such an exception.

463. See *id.* See also, e.g., Соглашение между СССР и Австрийской Республикой о Содействии Осуществлению и Взаимной Защите Капиталовложений [U.S.S.R. – Austria Bilateral Inv. Treaty], art. VII, 2 Aug. 1990, БЮЛЕТЕНЬ МЕЖДУНАРОДНЫХ ДОГОВОРОВ, [Bulletin of INTERNATIONAL TREATIES], (“Споры . . . касающиеся размера и порядка выплаты компенсации, согласно статье 4 настоящего Соглашения [об экспроприации]. . . будут решаться путем . . . арбитража”) [“Disputes . . . regarding amount or mode of payment of compensation, according to Section 4 of this Agreement [dealing with expropriation] . . . will be resolved through . . . arbitration”], available at [http://zakon4.rada.gov.ua/laws/show/040\\_014](http://zakon4.rada.gov.ua/laws/show/040_014).

464. See Berger, *supra* note 459.

465. For a discussion of pre-investment screening, see Berger, *supra* note 459, at 8.

investment protection and negotiate exceptions on an issue-by-issue basis in an appendix.<sup>466</sup>

At the very moment China's own approaches have shifted in the direction of the U.S. approach to investment law, other states are emerging as hubs for a more restrictive approach. As states such as India have seen the interpretation of investment protections and the costs BITs impose on states increase, they have begun to revise their model BITs to preserve more freedom for state action and intervention.<sup>467</sup> While India's early BITs were strongly pro-investor, it has now paused its BIT program to develop a new model treaty that, according to the Indian Commerce Minister, will "eliminate the prospects of disputes between the investors and the government in the future" by allowing Indian courts to have "the last word on commercial disputes" and ensuring that "sovereign guarantees" are not infringed.<sup>468</sup> Similarly, the Southern African Development Community, an intergovernmental organization including most countries in southern Africa, has recently produced perhaps the most state-friendly model BIT to date, including explicit rights for states to regulate in pursuit of development objectives.<sup>469</sup> A recent generation of so-called "south-south" BITs between developing states is also moving in this direction, including far more limited national treatment provisions and imposing "restrictions to foreign investors' repatriation of funds."<sup>470</sup> Whether India, Russia, or some other state emerges as a new hub expressly advancing this alternative set of preferences in international investment law remains to be seen. But even as China—the original hub for this approach—changes its preferences, pluralism continues to increase and a range of states have the potential for issue-specific leadership.

This tension over the role of the state in economic development is also evident in aspects of international trade law, where Brazil and India are emerging as hubs for a more state-centric preference set. In international intellectual property law, India has asserted the right of the state to intervene by breaking patent protections on pharmaceuticals through a far-reaching interpretation of compulsory licensing under the Agreement on Trade

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466. See Betsy Bourassa, *US and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations*, TREASURY NOTES, U.S. DEPT. OF TREASURY, July 15, 2013, <http://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement-.aspx>.

467. These trends are part of a broader rebalancing of international investment law. See Roberts, *supra* note 453, at 179. The United States, for example, has sought to limit expansive interpretations of fair and equitable treatment and to provide labor protections. See U.S. DEPT. OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY (2012), available at <http://www.state.gov/documents/organization/188371.pdf>. For criticism, see Stephen Schwebel, *The United States 2004 Model Bilateral Investment Treaty: an Exercise in the Regressive Development of International Law*, 2 TRANSNAT'L DISP. MGMT. 4 (2006).

468. Anand Sharma, *India Puts Conditions for Bilateral Investment Treaty with the US*, ECON. TIMES, July 23, 2013, [http://www.articles.economictimes.indiatimes.com/2013-07-23/news40749425\\_1\\_investment-treaty-protection-agreement-bilateral-investment-promotion](http://www.articles.economictimes.indiatimes.com/2013-07-23/news40749425_1_investment-treaty-protection-agreement-bilateral-investment-promotion).

469. See S. AFR. DEV. CMTY., SADC Model Bilateral Investment Treaty Template with Commentary art. 20–22, July 2012, available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.

470. See Poulsen, *supra* note 167, at 130 (based on an empirical analysis of "south-south" BITs).

Related Aspects of Intellectual Property Rights (“TRIPS”).<sup>471</sup> TRIPS was intended to harmonize IP protections, whereby developing states would “adopt IP regimes comparable to those of developed countries.”<sup>472</sup> Instead, India has challenged and adapted the regime to better reflect its preference for state activism in pursuit of inclusive growth. India was a central force behind the 2001 Doha Declaration, which affirmed that TRIPS “can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health, and, in particular, to promote access to medicines for all.”<sup>473</sup> After joining TRIPS and establishing pharmaceutical patent protections in 2005, India has imposed subject matter limitations on patents and enacted procedural hurdles for grants of pharmaceutical patents. While arguably consistent with TRIPS, these measures reduce patent protection in favor of state development goals.<sup>474</sup> Similarly, Indian regulators and domestic courts have granted compulsory licenses for key cancer drugs to advance domestic public health objectives even in the face of significant pressure from foreign drug manufacturers and governments.<sup>475</sup> In the 2013 landmark Novartis case, the Indian Supreme Court interpreted India’s TRIPS implementing legislation narrowly, ensuring the availability of compulsory licenses and strictly limiting the ability of foreign manufacturers to extend patent duration.<sup>476</sup>

As a hub on these issues, India has attracted followers, Brazil foremost among them. Brazil has enacted similar domestic legislation to increase TRIPS flexibilities for pharmaceuticals, thereby allowing state intervention that spreads the benefit of development in healthcare beyond the minority who could afford patent-protected drugs.<sup>477</sup> South Africa has joined this move, expressing the intent to “amend its patent legislation to allow it to use the parallel importation and compulsory licensing rights.”<sup>478</sup> India’s ef-

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471. See *Agreement on Trade Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, 33 INT’L LEGAL MATERIALS 81 (1994).

472. Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India’s Pharmaceutical Sector*, 97 CAL. L. REV. 1571, 1572 (2009).

473. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/Dec/1, 41 ILM 746 (2002) [hereinafter Doha Declaration].

474. For discussion, see Kapczynski, *supra* note 472, at 1589–1613.

475. In the first 2011 case, the Indian patent controller conferred a Compulsory License on Natco Pharmaceutical to manufacture a generic version of a patented cancer drug and, thereafter, issued similar licenses for a variety of other drugs. *Natco Pharma Limited v. Bayer Corporation* (2012) 1 C.L.A. (India) (Compulsory License No. 1 of 2011).

476. *Novartis AG v. Union of India & Others* (2013) Civil Appeal Nos. 2706-2716 of 2013 (Arising out of SLP(C)) Nos. 20539-20549 of 2009.

477. See Michelle Ratton Sanchez Badin, *Developmental responses to the international trade legal game: cases of intellectual property and export credit law reforms in Brazil*, in *LAW AND THE NEW DEVELOPMENTAL STATE* 278–79 (Trubek *et al.*, eds. 2013) (discussing Brazil’s TRIPS flexibilities); Sarath K. Ganji, *TRIPS Implementation and Strategic Health Policy in India and Brazil*, 3 U. DENVER J. ADV. INT’L STUD. 29, 38 (2009).

478. Lynne Taylor, *S. Africa Pledges Action on Compulsory Licenses, Parallel Imports*, PHARMATIMES DIGITAL (Nov. 7, 2013), [http://www.pharmatimes.com/Article/13-1107/S\\_Africa\\_pledges\\_action\\_on\\_compulsory\\_licenses\\_parallel\\_imports.aspx](http://www.pharmatimes.com/Article/13-1107/S_Africa_pledges_action_on_compulsory_licenses_parallel_imports.aspx).

forts to reshape aspects of intellectual property law have led some observers to suggest that “Patent Law 2.0” may be emerging as an alternative to the standard interpretation of TRIPS.<sup>479</sup>

India and Brazil are also serving as hubs for alternative views of other trade issues where their visions of state-centric and inclusive development are at stake. India, for example, led recent efforts to negotiate a treaty within the context of the World Intellectual Property Organization that limits copyright protections to facilitate access to materials for the visually impaired.<sup>480</sup> India proved the pivotal force behind the treaty, building the coalition of followers necessary for its conclusion.<sup>481</sup> In the wake of this diplomatic success and in response to concerns that India’s new food security law<sup>482</sup> will violate Aggregate Measures of Support commitments under the WTO Agriculture Agreement,<sup>483</sup> India has been engaged in active diplomacy to find an *ex ante* legal solution in the run up to the December 2013 WTO Ministerial meeting.<sup>484</sup> Brazil has followed suit, albeit on different issues. After its efforts to subsidize aircraft manufacturer Embraer were curtailed in a WTO dispute brought by Canada,<sup>485</sup> Brazil strategically shifted the issue of aircraft financing out of the WTO and into a diplomatic negotiation at the OECD, where it had better “bargaining leverage” and could help develop an alternative legal regime more favorable to state support for key domestic industries.<sup>486</sup>

In both investment and trade, India, Brazil, and China have, in different ways, emerged as hubs for preferences that reassert the role of the state in economic development and that are in tension with the economic liberalism inherent in the Washington Consensus. These hubs’ preferences may change

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479. See Amy Kapczynski, *Engineered in India — Patent Law 2.0*, 389 NEW ENG. J. MED. 497 (Aug. 8, 2013), available at <http://www.nejm.org/doi/full/10.1056/NEJMp1304400>.

480. See Marrakesh Treaty to Facilitate Access to Public Works For Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled, World Intellectual Property Organization, June 27, 2013; see also Pankaj Mishra, *WIPO Reaches Agreement on Treaty for the Blind*, LIVENMINT (June 26, 2013), <http://www.livemint.com/Politics/zirXp3IC1rTtAfOd2O4fYL/WIPO-reaches-agreement-on-treaty-for-blind.html> (describing the “crucial role” played by India’s negotiators).

481. See, e.g., Government of India, India’s Closing Statement at Marrakesh on the Treaty for the Blind (June 28, 2013), available at <http://cis-india.org.a2k/blogs/india-closing-statement-marrakesh-treaty-for-the-blind>. Enhanced access part is consistent with India’s vision of inclusive development.

482. See *supra* text accompanying notes 425–426.

483. These commitments limit subsidized agricultural sales in the domestic market. See Agreement on Agriculture, Apr. 15, 1994, Annex 1A, 1867 U.N.T.S. 410, art. 1.

484. This might include an extension of the so-called “peace clause” that had prohibited challenges to developing state agricultural policies through 2004. *Id.*, at art. 13 (precluding certain challenges to developing country’s agricultural policies); see Sujay Mehdudia, *WTO Chief Raises Concerns Over India Food Security Law*, THE HINDU (Oct. 7, 2013), <http://www.thehindu.com/news/national/wto-chief-raises-concerns-over-india-food-security-law/article5210505.ece>.

485. See Panel Report, Brazil-Export Financing Programme for Aircraft, WT/DS46/R (Apr. 14, 1999); Appellate Body Report, Brazil-Export Financing Programme for Aircraft, WT/DS46/AB/R (Aug. 2, 1999) and a series of related complaints.

486. See Trubek, *supra* note 447, at 9. For a discussion of the ultimate agreement on aircraft financing reached under the auspices of the OECD, see Angel Gurría, OECD Secretary-General, Remarks at OECD Aircraft Sector Understanding: Signing Ceremony (Feb. 25, 2011).

over time, but even if they do, pluralism in international economic law is increasing. As with sovereignty and legitimacy, it is too early to predict the future development of trade and investment law. It seems likely, however, that some subsystem-level legal regimes will come to reflect these more state-centric views, perhaps through alternative provisions in regional trade or investment agreements, and that global-level economic rules, where they emerge or adapt, will “bring the state back in” to international economic law.<sup>487</sup>

## V. CONCLUSION

Writing in 1940, Morgenthau predicted that a “fundamental change in the social forces underlying a system of international law”—such as the power redistribution of the past decade—would result in “a competitive contest for power.” He anticipated that “change [in] the existing legal order will be decided, not through a legal procedure provided for by this same legal order, but through a conflagration of conflicting social forces which challenge the legal order as a whole.”<sup>488</sup> His prediction has not come to pass. Instead, over the past decade, the international legal system has accommodated an extraordinary redistribution of power. It has changed in the process, but has remained robust and durable. The preferences of states, as well as the distribution of power amongst them, matter to the processes and substance of international law. New powers have embraced the system as a whole because it furthers their interests. They are using their newfound power to adapt it from within.

Three implications of this redistribution of power have already become clear. First, international law has transitioned from a unipolar structure to a multi-hub structure. In this new order, leadership has diversified such that far more states are capable of acting as hubs and driving international legal processes. This multi-hub structure is comprised of numerous, flexible subsystems that operate in a kind of variable, issue-specific geometry. It is a structure in which non-hubs often have multiple choices as to which hubs to follow on any given issue. And it is a structure in which legal processes are migrating into these subsystems, often at the expense of global-level alternatives.

Second, this multi-hub structure is promoting pluralism within international law. Whereas, during the transatlantic moment, the United States and Europe were largely able to limit international legal discourse and rule development in accordance with their preferences, the multi-hub structure fosters the articulation of alternative preferences. Pluralism has already become evident at three tension points: sovereignty, legitimacy, and economic

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487. PETER B. EVANS, DIETRICH RUESCHEMEYER, AND THEDA SKOCPOL, *BRINGING THE STATE BACK IN* 1 (1985).

488. See Morgenthau, *supra* note 12, at 273–274.

development. Additional points of pluralism are likely to emerge in the years ahead. Even if these preferences themselves are not new, the new power of the states that articulate them is altering the substantive development of international legal rules. The distinct preferences advanced by hubs will challenge the preferences the United States and Europe have successfully embedded in many international legal regimes over the past half century. Overtime, these regimes will adapt to accommodate new preferences, both within separate subsystems and globally.

Third, while this new pluralism will have distinct implications in specific areas of the law, a common element emerges from the alternative preferences for sovereignty, legitimacy, and economic development now being articulated. At each of these tension points rising powers are advancing a far more state-centric vision of international law. It is a vision of international law that reaffirms state sovereignty, bases the legitimacy of international legal processes and institutions on long-standing principles of sovereign equality, and puts the state back into the center of economic development. This reassertion of the centrality of the state conflicts with the individualization of international law, a hallmark of the period of U.S. leadership. For legal rules and regimes that seek to advance this individualization or draw their effectiveness from it—human rights law, the law of investment protection, and the law of humanitarian intervention, for example—the return of the state will likely have pronounced negative consequences. Over time these regimes may be ratcheted back as international law returns closer to its Westphalian origins as a system of sovereigns, among sovereigns.

It is, however, premature to draw final conclusions. The multi-hub model, as developed here, depends on two assumptions that, while presently valid, could shift. First, the model has assumed that the preferences of rising powers are not consistently aligned<sup>489</sup> in a way that would create a stable coalition to replace U.S. hegemony.<sup>490</sup> Second, the model has assumed that hub leadership and subsystems remain flexible, changing on different issues, and providing non-hubs with choices as followers of different hubs and subsystems. If either of these assumptions proves wrong, the resulting international legal system would look quite different and far less appealing from the U.S. perspective.

Imagine two different versions of the international legal system that might develop if these assumptions are relaxed. First, should the preferences of rising powers coalesce such that a collective of new powers replaces the United States as hegemon, the system itself might look more like a bipolar one with the United States and Europe on one side, and rising powers on the

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489. See generally Brutsch & Papa, *Deconstructing the BRICS: Bargaining Coalition, Imagined Community, or Geopolitical Fad?*, 6 CHINESE J. INT'L POL. 299 (2013).

490. Political scientists describe the cooperating states as a K-Group. See THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* (1960); Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 INT'L ORG. 579, 621 (1985).

other. The system might well break down into two larger, relatively rigid subsystems engaged in a protracted struggle. The preferences of the United States and Europe might prevail on one side of this competition, while a largely separate international legal system that reflects the preferences of rising powers would develop on the other.

Or, should the assumption that hub leadership remains flexible prove incorrect, a second scenario arises. If several hubs developed such a predominance of power in their respective regions that non-hubs had no choice but to follow, leadership would lock in and subsystems would become rigid. Variable geometry would give way to comprehensive spheres of influence. The behavior of some new hubs, notably Russia, suggests a desire to move in this direction. The resulting international legal system would be one of fixed, fragmented regions. International legal process would devolve into these subsystems of increasing rigidity, in which the substance of international law would develop separately. Substantive norms would divide and fragment as hubs impose their particular preferences on non-hubs in their subsystems. In the rare cases where global legal processes would still occur, outcomes would be determined by great power rivalry. Pluralism would be transformed into fragmentation and indeterminacy.

The few international lawyers who have considered the implications of the redistribution of global power have largely agreed that it bodes poorly for the future of international law as an institution and, particularly, for the United States.<sup>491</sup> Perhaps they have envisioned one of these two negative scenarios. The good news, however, is that neither of these scenarios seem likely today. Power and leadership remain diffuse. Preferences are differentiated. Subsystems remain flexible. Pluralism is enriching the normative content of international law. The multi-hub system appears to be successfully accommodating both power shifts and substantive change.

Perhaps most surprisingly, the multi-hub structure actually serves United States interests very well. Admittedly, in this new structure the United States will not be able to prevail on every issue or in every legal process. Even during the period of U.S. hegemony, however, it could not do so. Yet, the United States stands to benefit in the multi-hub system for three reasons. First, the United States has long sought flexibility in international law so that it could use the system to advance whatever preference or strategic interest it might have at a given time. As a hegemon, the United States enjoyed the flexibility that comes with shaping and running the system.<sup>492</sup> The greater pluralism of the multi-hub structure allows the United States to continue to enjoy this flexibility even as its hegemony declines. The United States can pick and choose among different preferences being articulated by other hubs or articulate its own preferences when necessary. Pluralism may

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491. See, e.g., Posner & Yoo, *supra* note 8.

492. On these benefits of hegemony, see Krisch, *supra* note 7.

mean that international law provides less constraint or certainty, but that is exactly what the United States has long sought.

Second, in a system in which legal processes migrate downward into flexible subsystems, the United States can advance its interests through international legal processes contained within such subsystems. During the period of U.S. hegemony, the United States often undertook the arduous and costly task of building global consensus. Relying on “coalitions of the willing” was a second best alternative subject to significant criticism. In the multi-hub system, in contrast, legal processes are occurring within such subsystems with greater regularity. As a result, the United States can work through smaller, less costly coalitions of states that share its interests on particular issues. Given the groundwork laid during the period of U.S. hegemony, the United States is the beneficiary when variable geometry becomes the norm, not the exception, for international legal processes.<sup>493</sup>

Third, the fact that rising powers have chosen to operate within the international legal system, rather than challenge the system itself, means that, in order to advance their own interests, rising powers will share the costs of leadership. New hubs are beginning to lead legal processes within their own subsystems, assuming costs of enforcement, and helping bear the burdens previously carried by the United States alone. The United States may not always see its preferences articulated in the rules and interpretations other hubs are advancing. It may not always like the rules that new hubs choose (or refuse) to enforce. But, if it embraces pluralism, the United States can share the overall costs of managing a surprisingly robust system.

Despite the seductiveness of prediction, history usually proves such efforts wrong. Ultimately, this paper seeks to open a conversation and research agenda on the ways that present power shifts are altering the structure of international legal processes and the substantive rules of international law. Future inquiries must be both country- and issue-specific. They must consider both power and preferences. This paper has sought to begin that effort by providing a first-cut analysis of structural changes that are already underway and identifying the substantive tension points at which new pluralism is emerging. In so doing, it offers a starting point for further analysis. At the very least, it has sought to reorient the debate from the power *of* international law to the role of power *within* international law.

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493. On the ability of the United States to build coalitions, see Anne-Marie Slaughter, *America's Edge: Power in the Networked Century*, 88 FOREIGN AFF. 94 (2009).



